(23,141)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1065

SUSAN J. TAYLOR, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF HOWARD E. TAYLOR, DECEASED, PLAINTIFF IN ERROR,

vs.

SEXTUS E. TAYLOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received, Due to Sextus E. Taylor.

Writ of Error, Record and Proceedings.

a UNITED STATES OF AMERICA,
Supreme Court of the State of New York,
County of Orange, ss:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Court, in the Village of Goshen, Orange County, New York, this 29th day of February, 1912.

[Orange County Seal.]

[SEAL.] J. D. McGIFFERT, *Clerk.*

b UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, on a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled In the matter of the application of Sextus E. Taylor, to compel Susan J. Taylor, as Administratrix of the goods, chattels, and credits which were of Howard E. Taylor, deceased, to turn over money that she received due to Sextus E. Taylor, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Susan J. Taylor, as Administratrix of the goods, chattels, and credits which were of

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Howard E. Taylor, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concernng the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 28/115. Filed Feb. 20, 1912, 11.30 a. m.

d New York Court of Appeals.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received, Due to Sextus E. Taylor.

Papers on Appeal.

Frank Lybolt, Attorney for Appellant, Port Jervis, N. Y.
Edward Frank Glover, Attorney for Respondent, 60 Wall St., New York City, N. Y.

1 *Order to Show Cause.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received, Due to Sextus E. Taylor.

On reading the petition of Sextus E. Taylor, duly verified on the 4th day of December, 1910, from which it appears that said petitioner is the father of Howard E. Taylor, who died on the 5th day of August, 1910, a resident of Port Jervis, County of Orange, State of New

York; that said deceased died leaving surviving said petitioner, his father and Susan J. Taylor, his widow, sole next of kin; that by virtue of the State of New York's Decedent Estate Law, Laws of 1909, Chapter 18, an Act relating to estates of deceased persons, constituting Chapter 13 of the Consolidated Laws '98, subdivision 7, and it also appears that Susan J. Taylor was appointed administratrix of the goods, chattels, and credits, which were — Howard E. Taylor, deceased, by the Surrogate of Orange County, State of New York, and that she is in possession of Five thousand dollars,
2 as a compromise, with the Erie Railroad Company, authorized settlement by the Surrogate of Orange County, State of New York, for the benefit of the deceased estate, and to be distributed according to the laws of the State of New York.

Now, on motion of Edward Frank Glover, attorney for said petitioner, it is

Ordered, that Susan J. Taylor show cause before me, or one of the Justices, at a Term thereof, Part I, to be held at the Westchester County Court House, at White Plains, Westchester County, State of New York, on the 16th day of December, 1910, at 10 o'clock in the forenoon of that day, why she has refused to pay over the money received by her as administratrix for the negligent killing of Howard E. Taylor, according to the laws of the State of New York, and it is further

Ordered, that service of this order, together with copy of said petition upon Susan J. Taylor two days prior to the 16th day of December, 1910, shall be sufficient service thereof.

Dated at New Rochelle, N. Y., December 8th, 1910.

M. J. KEOGH,
Justice Supreme Court.

3 *Petition of Sextus E. Taylor Read in Support of Motion.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received, Due to Sextus E. Taylor.

To the Supreme Court:

The petition of Sextus E. Taylor respectfully shows to this Court upon information and belief:

1. That your petitioner resides in the City of Port Jervis, Orange County, State of New York, and is the father of Howard E. Taylor, who, on the 5th day of August, 1910, was negligently killed by the Erie Railroad Company, The Erie and Jersey Railroad Company and the Erie Terminal Railroad Company, while in the employ of the said Erie Railroad Company. The said Howard E. Taylor immediately and prior to his death was a resident of Port Jervis, County of Orange, State of New York. That on or about the 30th day

of August, 1910, limited letters of administration were issued
4 by the Special Surrogate to Sextus E. Taylor, the father of Howard E. Taylor, deceased, and that thereafter and on the 1st day of September, 1910, on the petition of Susan J. Taylor, the widow of Howard E. Taylor, these letters were revoked. A copy of Susan J. Taylor's petition is made a part of this petition and marked Exhibit "I"; and on the 31st day of August, 1910, a petition of Susan J. Taylor was presented to the Surrogate of Orange County and thereafter on the 7th day of September, 1910, letters of administration were issued to Susan J. Taylor to adminstrate upon the estate of Howard E. Taylor, deceased. A copy of her petition is made a part of this petition, and marked Exhibit II; and that she was empowered with the right to prosecute any right of action granted by special provision of law as such administratrix, and that on or about the 19th day of September, 1910, as administratrix, she brought an action in the Supreme Court, Orange County, against the Erie Railroad Company to recover damages for the death of said Howard E. Taylor, under an act of Congress of the United States approved April 22nd, 1908, entitled "An Act Relating to Liability of Common Carriers by Railroads to Their Employés Under Certain Cases," and that on or about the 11th day of November, 1910, the said Susan J. Taylor petitioned the Surrogate of Orange County to permit her to settle and compromise the cause of action he empowered her to commence for the sum of Five thousand dollars. Her petition dated November 11th, 1910, is made a part of this petition, and marked Exhibit III. And thereafter on or about the 16th day of November, 1910, by an order of John B. Swezey, Surrogate of Orange County, it was ordered that Susan J. Taylor, as administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, was authorized to settle and accept the offer of judg-
5 ment for $5,000 made by the Erie Railroad Company without any notice to the father, Sextus E. Taylor. A copy of the order is made a part of the petition and marked Exhibit IV.

That by the said petition of Susan J. Taylor dated November 11th, 1910, she states that under said act of Congress she is entitled to the whole amount of settlement, and by a letter of her attorney, Frank Lybolt, dated November 30th, 1910, which is made a part of this petition, and marked Exhibit V, he does not see wherein Sextus E. Taylor, as father, is entitled to any of the money or even interested in the proceedings.

That your petitioner, Sextus E. Taylor, by virtue of the Decedent Estate Law, Laws of 1909, Chapter 18, an act relating to estates of deceased persons, constituting Chapter 13 of the Consolidated Laws, Section 98, sub-division 7.

"If a deceased leaves a father and no child or decedent, the father shall take one-half, if there be a widow."

The said Howard E. Taylor died leaving a widow, but no child or decedent, but a father, Sextus E. Taylor, your petitioner herein.

That your petitioner claims that the act of Congress of the United States approved April 22nd, 1908, entitled, "An Act Relating to the Liability of Common Carriers by Railroads to Their Employés Under

Certain Cases" is unconstitutional, as it abrogates and conflicts with the New York State Rights of disposing of Decedent Estates within the State of New York, which is one of the reserved powers of the State of New York, not given to the Federal Constitution.

That there is other property left by Howard E. Taylor, deceased, which prevents the administratrix from rendering an account
6 to the Surrogate for one year, and whereas the Five thousand dollars made as settlement for the negligent killing of Howard E. Taylor, is not liable for his debts under Section 1903 of the Code of Civil Procedure.

Wherefore, your petitioner prays for an order to Susan J. Taylor to show cause why she should not pay over one-half of the Five thousand dollars received by her for the negligent killing of Howard E. Taylor, to the father, Sextus E. Taylor, in accordance with Chapter 13 of the Consolidated Laws, Section 98, sub-division 7, and for other relief that may be deemed just.

SEXTUS E. TAYLOR, *Petitioner.*

STATE OF NEW YORK,
County of Orange, ss:

Sextus E. Taylor, being duly sworn, says: That he is the petitioner herein, and that he has read the foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

SEXTUS E. TAYLOR.

Sworn to before me this 4th day of December, 1910.
[SEAL.]

M. J. BURK,
Notary Public.

7 *Petition of Susan J. Taylor in Support of Motion.*

EXHIBIT I.

Surrogate's Court, Orange County.

In the Matter of the Application to Revoke Letters of Administration Issued to Sextus Taylor on the Goods, Chattels and Credits of Howard E. Taylor, Deceased.

To the Surrogate's Court of the County of Orange:

The petition of Susan J. Taylor respectfully shows to the Court:

That your petitioner resides in the City of Port Jervis, Orange County, New York, and is the widow of Howard E. Taylor, said deceased, who died on the 5th day of August, 1910, a natural death, being at the time of his death a resident of the City of Port Jervis in said County of Orange; that said deceased died leaving him surviving your petitioner, his widow, and Sextus E. Taylor, the father of said deceased, as his sole next of kin.

That deponent is informed and verily believes that heretofore and on the 30th day of August, 1910, limited letters of administration were issued by the Special Surrogate of the County of
8 Orange to said Sextus Taylor, the father of said Howard E. Taylor, deceased. That your petitioner, the widow of said deceased, was not cited to show cause why letters should not be issued to said Sextus E. Taylor, nor was she cited to appear in any way upon the application for such letters of administration nor has your petitioner renounced her right to administrate upon the estate of her said husband, nor has she in any way waived her right to administrate upon said estate or to have letters of administration issued to her thereon.

That your petitioner is of the age of twenty-five years, of sound mind and in all respects competent to administrate upon said estate and desirous to obtain letters of administration upon the estate of her said late husband. That deponent on August 31st, duly presented her petition to the Surrogate of Orange County for letters of administration on the estate of her husband and is now informed by Frank Lybolt, her attorney, that said letters of administration were issued to said Sextus E. Taylor. Your petitioner is informed and verily believes that she is entitled to have letters of administration issued to her and believes that letters were issued to said Sextus E. Taylor through fraud or deception.

Your petitioner therefore prays for an order to show cause, returnable before this Court, why the said letters of administration issued to said Sextus E. Taylor should not be cancelled and revoked together with such other and further relief as the Court may deem necessary to be granted your petitioner herein. That no previous application has been made for such order.

Dated, September 1, 1910.

SUSAN J. TAYLOR, *Petitioner.*

9 EXHIBIT II.

Petition of Susan J. Taylor in Support of Motion.

Surrogate's Court, County of Orange.

In the Matter of the Application for Letters of Administration of the Goods, Chattels and Credits of Howard E. Taylor, Deceased.

To the Surrogate's Court of the County of Orange:

The petition of Susan J. Taylor of the City of Port Jervis in said County of Orange respectfully showeth:

That your petitioner is the widow of the said deceased, who died on the fifth day of August, 1910, a natural death, being at the time of his death a resident of the City of Port Jervis, in said County of Orange, without leaving any Last Will and Testament, to the knowledge, information or belief of your petitioner; that said deceased died possessed of certain personal property within this State, and that as your petitioner is informed and believes, the value of the personal property of which the said deceased died possessed, exclusive of the

probable amount to be recovered by reason of any right of
10 action granted to an executor or administrator of the said deceased by special provisions of law, does not exceed the sum of Fifty dollars, and that the value of real property whereof the said deceased died possessed situated in the State of New York does not exceed the sum of no dollars. That said deceased has left him surviving his widow, your petitioner and following next of kin, whose names and places of residence and their relationship to said intestate, as far as the same can be ascertained upon diligent inquiry, are as follows:

Sextus E. Taylor, father, residing at Port Jervis, N. Y.

That the said deceased left no widow, husband or next of kin surviving him except as above stated.

That no letters of administration upon the estate of the said deceased have been granted out of any Court in this State, and no previous application has been made for such letters, to the knowledge or belief of your petitioner. Your petitioner therefore prays that a decree may be granted by the Surrogate of the County of Orange awarding letters of administration of the goods, chattels and credits of said deceased to her, pursuant to the statute in such case made and provided limited however to a right of action or actions for damages for death of said deceased, caused by negligence.

Dated the 31st day of August, 1910.

SUSAN J. TAYLOR.

11 COUNTY OF ORANGE, *ss:*

Susan J. Taylor, being duly sworn, says that she is the petitioner named in the foregoing petition; that the matters set forth in the petition are true of her own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.

SUSAN J. TAYLOR.

Sworn to before me this 31st day of August, 1910.

FRANK LYBOLT,
Notary Public.

COUNTY OF ORANGE, *ss:*

I, Susan J. Taylor, do depose and say that I am a resident of the City of Port Jervis in the County of Orange; that I am over the age of twenty-one years, and I do solmenly swear and declare that I will well, honestly and faithfully discharge the duties of administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, according to law.

SUSAN J. TAYLOR.

Sworn to before me this 31st day of August, 1910.

FRANK LYBOLT,
Notary Public.

12 EXHIBIT III.

Petition of Susan J. Taylor in Support of Motion.

Surrogate's Court, Orange County.

In the Matter of the Estate of HOWARD E. TAYLOR, Deceased.

To the Surrogate's Court of Orange County:

The petition of Susan J. Taylor respectfully shows to this Court:

First. That your petitioner is the administratrix of the goods chattels and credits of Howard E. Taylor, deceased, having — duly appointed such administratrix by decree of this court dated on the 7th day of September, 1910, and that letters of administration on said estate were duly issued to her on that day; that your petitioner, while empowered with the right to prosecute any right of action granted by special provision of law as such administratrix, was not given power to compromise or collect; that your petitioner has ever since been and is now acting as such administratrix.

Second. That said Howard E. Taylor was at the time of his death employed by Erie Railroad Company in the capacity of a locomotive fireman, and on August 5th, 1910, while engaged at his duties in that capacity, was killed by reason of the locomotive on which
13 he was engaged colliding with a large quantity of earth and rock which had previously fallen or slid down on Erie Railroad track, causing said locomotive to overturn and killing said Taylor instantly.

Third. That your petitioner, thereafter and on or about the 19th day of September, 1910, brought an action in the Supreme Court, Orange County, against said Erie Railroad Company to recover damages for the death of said Howard E. Taylor; that said Erie Railroad Company has served on Frank Lybolt, her attorney in said action, an offer of judgment for the sum of Five thousand dollars ($5,000.00) and costs, and this petition is made for the purpose of obtaining the consent of this Court allowing your petitioner to accept said offer of judgment.

Fourth. That your petitioner is the widow of said deceased and his only other next of kin being his father.

That at the time of the death of said Taylor and for some time prior thereto, your petitioner was the only one dependent upon him for maintenance and support, the father of said deceased being a locomotive engineer and still engaged in that capacity.

That the action brought by your petitioner against the said Erie Railroad Company was brought under an Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employés Under Certain Cases," said Taylor being at the time of his death engaged upon a train used for Interstate Commerce, and under said Act your petitioner being the sole dependent upon said Howard

E. Taylor, is, as she is informed and verily believes, entitled to the whole amount of recovery under said action.

Fifth. That your petitioner believes that it is for her best
14 interest and that of the estate to accept said offer of judgment and thus avoid the long delays and uncertainties attendant upon a trial and contest in the courts.

Wherefore, your petitioner prays for an order of this Court granting her leave to accept the offer of judgment made on the part of said Erie Railroad Company for $5,000.00 and costs.

Dated, November 11, 1910.

SUSAN J. TAYLOR, *Petitioner.*

STATE OF NEW YORK,
County of Orange, ss:

Susan J. Taylor, being duly sworn, says: That she has heard read the foregoing petition and knows the contents thereof, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and, as to those matters, she believes it to be true.

SUSAN J. TAYLOR.

Sworn to before me the 11th day of November, 1910.

EDWARD P. JONES,
Notary Public.

Endorsed as follows: Filed Nov. 16, 1910. State of New York, Surrogate's Court, County of Orange. In the Matter of the Estate of Howard E. Taylor, deceased. Petition and order permitting settling of action. Frank Lybolt, Attorney for Petitioner. Office and P. O. Address, Port Jervis, N. Y.

15 EXHIBIT IV.

Order of Surrogate Read in Support of Motion.

At a Term of the Surrogate's Court of Orange County, Held at the Chambers of the Surrogate, in the City of Port Jervis, N. Y., on the 16th Day of November, 1910.

Present: Hon. John B. Swezey, Surrogate.

In the Matter of the Estate of HOWARD E. TAYLOR, Deceased.

A petition having been presented to me by Susan J. Taylor, administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, praying for an order authorizing her to accept an offer of judgment for the sum of Five thousand dollars ($5,000) and costs, made by the defendant in an action in the Supreme Court, Orange County, by said Susan J. Taylor, as such administratrix, against Erie Railroad Company for causing the death of said Howard E.

Taylor on or about the 5th day of August, 1910, from which petition it appears to my satisfaction good and sufficient cause is shown for the making of such order, and the said Susan J. Taylor having executed and filed in this Court a bond duly approved by me in the penal sum of Ten thousand dollars ($10,000). Now, on motion of Frank Lybolt, attorney for said petitioner,

16 It is ordered, that Susan J. Taylor, the administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, be and she hereby is authorized to accept the offer of judgment for $5,000.00 and costs, made by Erie Railroad Company in an action brought by her against said Railroad Company for the death of said Howard E. Taylor, deceased, and to that end to serve upon the attorneys for said defendant the usual acceptance offer of judgment.

JOHN B. SWEZEY,
Surrogate of Orange County.

EXHIBIT V.

Letter Read in Support of Motion.

Frank Lybolt, Counsellor at Law, Hubbard Building, Port Jervis, N. Y.

NOVEMBER 30, 1910.

TAYLOR vs. ERIE CO.

Edward Frank Glover, Esq., 170 Broadway, New York City.

DEAR SIR: In further answer to your letter of November 21st, I feel that I should advise you that this action was brought under an Act of Congress of the United States respecting damages caused by reason of injuries received or death occurring to an employee on an interstate train, which Act provides that the recovery shall go to those dependent upon the decedent. I cannot see, therefore, wherein Mr. Sextus Taylor is at all interested in the proceeding and do not believe he is entitled to any of the recovery.

Very truly yours,
(Signed) FRANK LYBOLT.

17 *Affidavit of Susan J. Taylor Read in Opposition to Motion.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received, Due to Sextus E. Taylor.

STATE OF NEW YORK,
County of Orange, ss:

Susan J. Taylor, being duly sworn, says she is the widow of Howard E. Taylor, deceased, and was appointed administratrix of

his estate by a decree of the Surrogate of Orange County on or about the 7th day of September, 1910, and is still acting in that capacity. That said Howard E. Taylor, at the time of his death, was in the employ of Erie Railroad Company in the capacity of a locomotive fireman engaged upon and operating trains of cars carrying various kinds of produce and commerce, and running from points or places in one State of the United States through various States to points or places in another State of the United States, said Taylor being particularly employed in working upon and engaged in operating trains of cars running on said Erie Railroad from Port Jervis, in the State of New York, to Jersey City, in the State of New Jersey.

That on the 5th day of August, 1910, said Taylor took his position as fireman on a locomotive at Port Jervis, N. Y., which locomotive was attached to and hauling a train of cars carrying interstate commerce and which train had, with its load of commerce, previously passed through various States of the United States and which train was then destined to continue its interstate commerce trip, running from said Port Jervis, N. Y., to Jersey City, N. J., and said Taylor while so engaged and while on his way from said Port Jervis, N. Y., to Jersey City, N. J., was killed by reason of the locomotive upon which he was so engaged colliding with a pile of dirt and boulders, causing said locomotive to overturn.

That said Erie Railroad Company is a domestic railroad corporation, created and existing under the laws of the State of New York; that said Taylor at the time of his death resided in the City of Port Jervis, N. Y.; that deponent at the time of the death of her intestate resided, ever since has, and still resides in said City of Port Jervis, N. Y.

That deponent on or about the 21st day of September, 1910, brought an action against Erie Railroad Company to recover damages for the death of her said intestate, said action having been brought under an Act of Congress of the United States passed April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," a copy of the amended complaint being hereto annexed and forming a part of this affidavit. That thereafter an offer of judgment made by Erie Railroad Company was by deponent, with the consent of the Surrogate of Orange County, accepted and judgment was thereupon entered in the Clerk's office of Orange County, a copy of which judgment is hereto annexed and forms a part of this affidavit.

That at the time of the death of said Howard E. Taylor, deponent was the only one dependent upon him for support and the only one to whose support he was contributing, said Sextus E. Taylor being at said time and now is a locomotive engineer on said Erie Railroad and earning a good income.

That there is due and owing one Fred H. Porter the sum of Two hundred eight dollars ($208.00), funeral bill of said Howard E. Taylor; also the sum of Forty dollars ($40.00) due on premium on bond given by deponent on her appointment as administratrix of his

estate and Three hundred dollars ($300.00) attorney's fees, making a total of $548.00 to be deducted from said sum of $5,000.00 received by her, and leaving only the sum of $4,452.00 to be distributed, less also such commissions as may legally be due and payable to her as such administratrix.

SUSAN J. TAYLOR.

Sworn to before me December 15, 1910.
WILLIAM P. GREGG,
Notary Public.

20 *Complaint Against Erie Railroad Company Read in Opposition to Motion.*

Supreme Court, Orange County.

SUSAN J. TAYLOR, as Administratrix of the Goods, Chattels and Credits of Howard E. Taylor, Deceased, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

The plaintiff above named, for an amended complaint herein, complains of the defendant above named and alleges:

First. Upon information and belief, that the defendant was at times hereinafter stated and set forth and still is a domestic railroad corporation operating a railroad known as the Erie and Jersey Railroad Company in the County of Orange and State of New York.

Second. That prior to the commencement of this action, plaintiff was duly appointed administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, by the Surrogate of Orange County; that she duly qualified and is now acting as such, and is authorized and empowered by such appointment to bring and maintain this action.

Third. Said Howard E. Taylor, deceased, hereafter referred
21 to as plaintiff's intestate, was on August 5, 1910, and for some time prior thereto, in the employ of the defendant as locomotive fireman.

Fourth. That on said day, while plaintiff's intestate was in the service of defendant and engaged as a locomotive fireman upon one of the locomotives and trains of defendant then being operated by defendant upon the line of the Erie and Jersey Railroad Company at or near Howells, Orange County, New York, the said locomotive and train became derailed owing to a collision between said locomotive and a large quantity of rock which then or had previously fallen or slid upon said track and against said locomotive and train from an adjacent embankment, thereby causing the said locomotive to be overturned and causing injuries to plaintiff's intestate which then resulted in his death.

Fifth. That the derailment of said locomotive and train and the resultant death of plaintiff's intestate was caused by the negligence

and carelessness of defendant and of its agents, servants and employees in that each of them violated the duty imposed upon them by the Act of Congress hereinafter referred to.

Sixth. That the death of plaintiff's intestate was not occasioned because of any carelessness or want of due care upon his part.

Seventh. That the said Howard E. Taylor, deceased, left him surviving his widow, the plaintiff herein, the only person dependent upon him for support.

Eighth. At the time of the injury and death of said Howard E. Taylor, deceased, he was then in the employ of defendant and then engaged as part of his duty to and for defendant in interstate commerce and in the operation of an interstate commerce train from Port Jervis, in the State of New York, to Jersey City, in the
22 State of New Jersey. That at the time of said derailment and the injury and death of plaintiff's intestate, defendant as a common carrier by railroad was then engaging by the operation of said derailed train and in other respects in commerce between several States of the United States and particularly between the State of New York and the State of New Jersey. This action is brought by plaintiff against defendant under an Act of Congress of the United States, approved April 22nd, 1908, and entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases."

Ninth. Two years have not elapsed from the time this action accrued.

Wherefore, plaintiff demands judgment against defendant for the sum of Five thousand dollars ($5.000.00) damages, together with the costs and disbursements of this action.

FRANK LYBOLT,
Attorney for Plaintiff.

Office and Post Office Address, Port Jervis, N. Y.

(Usual verification.)

23 *Judgment of November* 28, 1910, *Read in Opposition to Motion.*

Supreme Court, Orange County.

SUSAN J. TAYLOR, as Administratrix of the Goods, Chattels and Credits of Howard E. Taylor, Deceased, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

The summons and complaint in the above entitled action having been duly served on the defendant, this action having been brought under an Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employés in Certain Cases," and the defendant having appeared herein by Watts, Oakes & Bright, its at-

torneys, and offered in writing to allow judgment to be taken against it herein for the sum of five thousand dollars ($5,000.00), with costs, and the plaintiff having within ten days thereafter duly accepted said offer, and the plaintiff's costs having been taxed at the sum of forty-three dollars and eighty cents ($43.80), now, on motion of Frank Lybolt, attorney for plaintiff, it is

Ordered, adjudged and determined that the plaintiff, Susan J. Taylor, as administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, recover of and from the defendant, Erie Railroad Company, the sum of $5,000.00 damages, to
24 be distributed according to the terms and conditions and to the persons as provided in said Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employés in Certain Cases," together with the sum of $43.80 costs, amounting in all to the sum of $5,043.80, and that the plaintiff have execution therefor.

JAMES D. McGIFFERT,
County Clerk.

25 *Order Appealed From.*

At a Special Term of the Supreme Court Held in and for the Ninth Judicial Department, at the Court House, in the Village of White Plains, Westchester County, N. Y., on the 10th Day of January, 1911.

Present: Hon. Martin J. Keogh, Justice Presiding.

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received Due to Sextus E. Taylor.

On reading and filing the petition of Sextus E. Taylor, verified December 4, 1910, exhibits thereto attached and therein referred to, affidavit of Susan J. Taylor, verified December 15, 1910, exhibits thereto attached and therein referred to, and order to show cause, returnable before this court December 16, 1910, and ad-
26 journed for further argument to this date, from which papers it appears that Susan J. Taylor, as administratrix of the estate of Howard E. Taylor, deceased, recovered of and from Erie Railroad Company the sum of $5,000.00 damages for the death of said Howard E. Taylor, which action was brought under an Act of Congress of the United States passed April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," and acts amendatory thereof, and it appearing that the account of said Susan J. Taylor as such administratrix, so far as said recovery is concerned, is as follows:

Received amount of recovery under action..... $5,000.00

Said administratrix is to be credited as follows:

Amount paid as premium on bond.....	$40.00	
Amount paid as attorney's fees.....	300.00	
Amount of commissions.....	150.00	
Amount paid Fred H. Porter, funeral bill...	208.00	
Total		698.00
Leaving amount to be distributed.....		$4,302.00

And it further appearing that Susan J. Taylor is the widow of said Howard E. Taylor, deceased, and the sole one dependent upon him for support.

After hearing Edward Frank Glover, Esq., attorney for the petitioner, Sextus E. Taylor, in support of said order, and Frank Lybolt, Esq., attorney for Susan J. Taylor, in opposition thereto, and after due deliberation, it is

Ordered that the said order to show cause be and the same is hereby vacated and the motion therein made denied, and it is further

Ordered, adjudged and determined, that the account of
27 said Susan J. Taylor, as such administratrix, as it affects the proceeds of said action, be, and the same hereby is, confirmed, and it is further

Ordered, adjudged and determined that Susan J. Taylor, as administratrix, pay to Susan J. Taylor, the widow and sole dependent of Howard E. Taylor, deceased, the sum of $4,302.00, to which said sum the said Susan J. Taylor, individually, is solely entitled under and by virtue of the provisions of said Act of Congress; that said administratrix take from herself individually a proper receipt therefor and upon such payment the said Susan J. Taylor, as administratrix, and the surety under her bond given and filed in the Surrogate's Court of Orange County, be, and they hereby are, discharged and relieved from further liability by reason thereof.

Enter in Orange County.

M. J. KEOGH, *J. S. C.*

Stay of 60 days.
M. J. K.

28 *Affidavit of No Opinion.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

STATE OF NEW YORK,
County of New York, ss:

Edward Frank Glover, being duly sworn, says that he is the attorney for the petitioner herein; that he is familiar with the above entitled proceeding and that the order to show cause was argued before Mr. Justice Keogh, and no opinion was given upon the argument or upon the denying of petitioner's motion.

EDWARD FRANK GLOVER.

Sworn to before me this 21st day of January, 1911.

JEFFERSON B. CONLEY,
Notary Public, Kings County.

Certificate filed in New York County.

29 *Notice of Appeal.*

Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

SIR: Please take notice that the petitioner herein appeals to the Appellate Division, Second Department, from each and every part of the order of Mr. Justice Martin J. Keogh, entered herein in the office of the Clerk of Orange County, on the 16th day of January, 1911, denying petitioner's motion.

Dated, New York, January 17, 1911.

Yours, etc.,

EDWARD FRANK GLOVER,
Attorney for Petitioner-Appellant, 170 Broadway, Borough of Manhattan, New York City.

To James D. McGiffert, Esq., Clerk of the County of Orange.
Frank Lybolt, Attorney for Relator-Respondent.

30 *Order of Reversal.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 5th Day of May, 1911.

Present: Hon. Almet F. Jenks, Presiding Justice.
" " Michael H. Hirschberg,
" " Joseph A. Burr,
" " Edward B. Thomas,
" " William J. Carr,
Justices.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix, etc., of Howard E. Taylor, Deceased, to Turn Over Money, etc.

Order on Appeal from Order.

The above named Sextus E. Taylor, Petitioner in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Orange on the 16th day of January, 1911,
31 denying motion to compel said administratrix to turn over certain moneys to petitioner, and the said appeal having been argued by Mr. G. V. S. Williams, of Counsel for the appellant, and submitted by Mr. Frank Lybolt, of Counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered that the order so appealed from be and the same is hereby reversed, with $10 costs and disbursements and matter remitted to Surrogate's Court of Orange County to be disposed of as provided in section 1903 of the Code of Civil Procedure.

Opinion by Carr, J., Jenks, P. J., Hirschsberg and Burr, J. J., concur, Thomas, J., not voting.

Entered.

ALMET F. JENKS, *P. J.*

32 *Judgment on Reversal.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR, to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received Due to Sextus E. Taylor.

An order to show cause having been heard before Honorable Martin J. Keogh, Justice of the Supreme Court in Westchester County, New York, and the argument of the respective parties having been heard and considered and the said Judge having duly made

an order confirming the account of Susan J. Taylor as Administratrix of the goods, chattels and credits of Howard E. Taylor, and ordered, adjudged and determined that Susan J. Taylor, as Administratrix, pay to Susan J. Taylor, the widow and sole dependent of Howard E. Taylor, deceased, the sum of Four Thousand, Three Hundred and Two Dollars ($4,302) to which said sum the said Susan J. Taylor individually is solely entitled under and by virtue of the provisions of Act of Congress of April 22, 1908, that said Administratrix take from herself individually a proper receipt therefor and upon such payment the said Susan J. Taylor as Administratrix and the surety under her bond given in the Surrogate's
33 Court of Orange County be and they hereby are discharged and relieved from further liability by reason thereof entered in the office of the Clerk of the County of Orange on the 16th day of January, 1911, and the petitioner, Sextus E. Taylor, having thereupon appealed to the Appellate Division of the Supreme Court from said order and such appeal having been duly heard by the Appellate Division of the Supreme Court for the Second Judicial Department, and the said Court having duly handed down its decision reversing the order on all things with $10 costs and disbursements to petitioner and the proceedings of such Court having been duly remitted to the Court and a certified copy of the decision of the Appellate Division, Second Department, having been duly filed in the office of the Clerk of Orange County, and the petitioner's costs upon said appeal having been duly taxed at Ten Dollars, now, on motion of Edward Frank Glover, attorney for petitioner-appellant herein, it is

Ordered and adjudged that the said order so appealed from be and the same hereby is reversed and the accounting be remitted to the Surrogate's Court of Orange County to be disposed of as provided in Section 1903 of the Code of Civil Procedure; and it is further

Ordered and adjudged that the petitioner, Sextus E. Taylor, recover from Susan J. Taylor individually the sum of $67.45, costs allowed and disbursements as adjusted and that he have execution therefor.

Dated, May 11th, 1911.

J. D. McGIFFERT, *Clerk.*

34 *Opinion of Appellate Division.*

CARR, *J.:*

On August 5, 1910, one Howard Taylor, a resident of Orange County, in this State, while engaged as a locomotive fireman by the Erie Railroad Company, a corporation of this State, met with an accident which caused his death. The accident happened through a collision between the locomotive of a train of cars and some rock and earth which had fallen upon the track. The train was at that time engaged in a trip from Port Jervis, in this State, to Jersey City, in the State of New Jersey, and the accident occurred within this State. Taylor left him surviving no children nor descendants, but

only a widow and a father. The widow was appointed as administratrix of the estate of the decedent by the Surrogate's Court of Orange County. She brought an action, as administratrix, against the railroad company in the Supreme Court in Orange County to recover damages for the death of her husband. The defendant in that action thereupon made a written offer of judgment against it in the sum of $5,000. The plaintiff applied to the Surrogate's Court for its approval of the offer of compromise or judgment, and, such approval being granted, she accepted the offer, and judgment was duly entered against the defendant in her favor and the amount thereof was paid over to her in satisfaction. The decedent's father thereupon moved at Special Term in this court for an order directing the plaintiff in that action to pay over to him one-half of the net proceeds of the judgment, in accordance with our statute of distributions. This motion was denied and an order was entered determining that the plaintiff, as widow of the decedent, was entitled to receive and retain for her own use all of the net proceeds of said judgment. From that order the decedent's father, Sextus Taylor, now appeals.

Actions by the personal representatives of deceased per-
35 sons to recover damages for the death of the decedent through the wrongful act, negligence or default of another person, or a corporation, are regulated in this State by sections 1902, 1903, 1904 and 1905 of the Code of Civil Procedure. These sections define the circumstances under which such actions may be brought, the extent of the recovery and the method of distribution of the damages recovered. In section 1903 it is provided that such damages "are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, * * * they must be distributed by the plaintiff as if they were unbequeathed assets left in his hands after payment of all debts and expenses of administration." By section 1905 the term "next of kin" as used in the foregoing sections is defined to have the meaning specified in section 1870 of the Code. On reference to that section it is found that the term "next of kin" includes all persons entitled under the provisions of law relating to the distribution of personal property to share in unbequeathed assets of a decedent after the payment of debts and expenses, other than a surviving husband or wife. The provisions of law relating to the distribution of such personal property are to be found in section 98 of the Decedent Estate Law, and in subdivision 7 of said section it is provided as follows: "If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole if there be no widow."

Sections 1902 to 1905 of the Code of Civil Procedure are but reenactments of Chapter 450 of the Laws of 1847, as amended by chapter 356 of the Laws of 1849 and chapter 78 of the Laws of 1870. In all these acts the damages recoverable in the action authorized by them are set apart for the exclusive benefit of the husband or widow and next of kin of the decedent, to be distributed as if they
36 constituted the net unbequeathed assets of the decedent's estate.

Section 18 of article 1 of our State Constitution provides that "the

right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." The "right of action" so referred to was the right of action given under the statute of 1847, as amended, and was a right of action given for the benefit of the husband or widow and next of kin of the decedent, and it was thus placed beyond any interference by the Legislature as to its essential elements. Yet all these provisions of our statutes and of our constitution relate only to rights of action arising under our own laws, and not to rights of action given under foreign laws and enforced in our courts by a rule of comity. The accident in which the decedent, Taylor, met his death happened in this State, the defendant in the action was a corporation of this State, the plaintiff obtained her legal right to bring an action under the laws of this State, and the right of action was enforced in the courts of this State. It would follow, therefore, necessarily that the distribution of the proceeds of the judgment so obtained should be made according to the statutes of this State, unless the right of action did not arise under the laws of this State, but arose under the laws of some other jurisdiction which provide a different scheme of distribution. When our courts assume jurisdiction of a right of action given under foreign laws there is no obligation that such right of action shall be asserted wholly under our remedial forms, but it may be asserted in the form permitted under the foreign laws. At the same time such right of action cannot be enforced in our courts by comity beyond the extent of such remedial limitations as our public policy attaches
37 to kindred rights of action arising under our own laws (Wooden v. Western N. Y. & P. R. R., 126 N. Y., 10). The respondent here justifies the order made at Special Term on the theory that the judgment obtained in the action in this court was based upon a right of action given by the laws of the United States, and not by the laws of this State, though enforced by comity in our court, and the proceeds thereof must be distributed in the manner specified by the laws which give the right of action, though such method differs from our own. As a general proposition this is, no doubt, true enough in relation to rights of action enforced in our courts simply through the rule of comity. The question directly involved in this appeal relates to whether the right of action enforced by the administratrix of Taylor, deceased, arose under our laws or was given exclusively by the laws of another jurisdiction. The respondent claims that this right of action arose under an act of Congress approved April 22, 1908, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," as amended by an act of Congress approved April 5, 1910, entitled "An Act to amend an Act entitled 'An Act relating to the liability of common carriers,'" &c. The first of these statutes provided that "every common carrier by railroad, while engaging in commerce between any of the several States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for

the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negli-
38 gence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment" (sec. 1, ch. 149, sess. 1 of Sixtieth Congress, U. S. Statutes at large, vol. 35, part 1, p. 65). The same statute further provided, in section 3, that in actions brought under its provisions contributory negligence shall not bar a recovery, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee"; and it further provided that where the violation by the common carrrier of any statute enacted for the safety of employees contributed to the injury or death of an employee he shall not be held to have been guilty of contributory negligence. Section 4 contains a similar provision as to the assumption of risks by the employee. The amendatory act of 1910 amends section 6 of the Act of April, 1908, to provide as follows: "Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business, at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The Act of 1908 was further amended by the Act of 1910 by adding a new section, section 9, as follows: "Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if
39 none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Turning to the complaint in the action in our court, in which the plaintiff sets forth a cause of action for damages, we see that she alleges as follows: (1) That the defendant is a domestic corporation; (2) her appointment as administratrix of the decedent; (3) his employment as a locomotive fireman by the defendant; (4) the decedent's death from an injury while working on one of the defendant's trains at a place called Howell's, in Orange County, in the State of New York, through a collision between the locomotive and a large quantity of rock which had fallen or slid upon the track; (5) that the collision was caused by the "negligence and carelessness of defendant and of its agents, servants and employees in that each of them violated the duty imposed upon them by the act of Congress hereinafter referred to"; (6) that the decedent was free from con-

tributory negligence; that the widow of the decedent was the only person dependent upon him for support; (7) that the train in question was engaged in interstate commerce at the time of the accident, and that the action was brought pursuant to an act of Congress, approved April 22, 1908.

The question now before this court is quite different from that presented to the Supreme Court of Connecticut in Hoxie v. N. Y., N. H. & H. R. R. (82 Conn., 352). There it was held that the courts of that State should decline jurisdiction of an action brought under this act of Congress to recover damages for the death of a decedent caused by an accident happening in the Commonwealth of Massachusetts. The discussion in the opinion of the court is most interesting and valuable. The chief ground on which the de-
40 cision was based was that the remedies granted by the act of Congress in question were so opposed to the common law and public policy of Connecticut that the courts of that State should refuse to enforce them under any rule of comity. In the precise case before that court there would have been no liability upon the defendant under the laws of Connecticut.

Here, in the case at bar, our courts did assume jurisdiction without question by the defendant, and judgment was entered on consent and satisfied. Whether our courts should assume jurisdiction of an action resting entirely upon this act of Congress is a question to be determined when it is raised by some corporation which resists its application and not in a case like the present one. For here it must be noted and kept in mind that the complaint on which the administratrix of the decedent came into our courts set forth facts which constituted a cause of action under the laws of this State. The collision described in the complaint must have happened necessarily from either one of two causes or from a combination of both. If the defendant was negligent in failing to keep its track reasonably safe, then it was liable to its servants at common law (Kuhn v. D., L. & W. R. R., 92 Hun. 74; s. c., 153 N. Y., 683; True v. Niagara Gorge R. R., 70 App. Div., 383; s. c., 175 N. Y., 487).

If the proximate cause of the accident was the negligence of the engineer in charge of the train in running the locomotive into an open obstruction, then the defendant was liable under section 42a of our Railroad Law, for, under that statute, the engineer was a vice principal. The complaint alleges further that there was no contributory negligence of the decedent, and such must be assumed to be the case. Therefore the plaintiff had a complete right of action under our laws, without resort to the act of Congress. Whether this act of Congress is a valid exercise of the Federal power to
41 regulate interstate commerce has not been determined at this writing by the Supreme Court of the United States, though there are numerous authorities in the lower Federal courts so deciding. In view of the intimations of the Supreme Court in Howard v. Illinois Central Ry. (207 U. S., 463) and in Adair v. United States (208 U. S., 161), it may be assumed, for the purposes of this opinion, that the legislation in question is a constitutional exercise of the power to regulate interstate commerce, though it may be said

that the question is not free from doubt, or, at least, free from reasonable debate. Assuming its validity, it is certainly questionable that Congress intended to supplant the laws of such States as afforded already a remedy as adequate as that which it granted itself. Take the case at bar: if the act of Congress here applies and displaces the remedial laws of this State as applied to this cause of action, the only substantial effect thereof is to change the method of distribution of the proceeds of recovery under an existing right of action. If Congress has such power in the premises, it must not be deemed to have attempted to exercise it unless the intent be unmistakable. To carry its assumed power to such extent would be an advance into governmental territory heretofore free from invasion and one fraught with dangerous consequences, considering the dual nature of our political systems and the absolute necessity that the functions of each should be kept sharply distinct. We are of opinion that the act of Congress in question should be considered as one granting a new remedy, under certain circumstances, where none, or a less adequate one, existed under the State laws, and as not intended to supplant or abrogate a right of action of practically equal extent existing under the laws of this State. It is only on the theory that this act of Congress constitutes the exclusive rule applicable to the facts of the case
42 before us that the order of the Special Term can be upheld. If the remedy afforded by our laws be concurrent with that provided by Congress, then we think that our public policy will not permit an administratrix appointed by our courts under our laws to use the Federal statute simply for the purpose of defeating our statute of distribution of personal property.

We think that the order appealed from should be reversed, with $10 costs and disbursements, and the matter should be remitted to the Surrogate's Court of Orange County to be disposed of as provided in section 1903 of the Code of Civil procedure.

All concur (Thomas, J., not voting).

43 *Notice of Motion on Leave to Appeal to Courts of Appeals.*

Supreme Court, Appellate Division, Second Judicial Department.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

SIR: Please take notice that upon the papers upon which the appeal to this court from the order made and entered on the 16th day of January, 1911, in the office of the clerk of Orange County, denying the motion of petitioner herein to compel the said administratrix to pay over to him certain moneys, was made, and the order of this Appellate Division made herein on the 5th day of May, 1911, reversing the said order denying petitioner's motion aforesaid, and the affidavit of Frank Lybolt, verified June 2nd, 1911, a copy of which is hereto attached, a motion will be made at a term of this

court appointed to be held at Borough Hall, in the Borough of Brooklyn, New York City, on the 19th day of June, 1911, at the opening of court on that day, or as soon thereafter as counsel
44 can be heard, for an order allowing Susan J. Taylor, as Administratrix aforesaid, to appeal to the Court of Appeals from the aforesaid order of the said Appellate Division made herein on the fifth day of May, 1911, and from the judgment entered thereon, and for a certificate of said Appellate Division certifying to the Court of Appeals for its determination in the manner provided by statute the following questions:

1. In an action by an administratrix, appointed by the Surrogate's Court of the State of New York in the County of Orange, brought in the Supreme Court of the State of New York under and in pursuance to an Act of Congress of the United States approved April 22, 1908, entitled, "An Act relating to the liability of common carriers of railroad to their employees in certain cases," as amended by an Act of said Congress approved April 5, 1910, entitled, "An Act to amend an Act entitled, 'An Act relating to the liability of common carriers,'" etc., to recover damages for the death of plaintiff's intestate, who was killed in the County of Orange, in said State, in which action a judgment was rendered in favor of plaintiff, should the damages recovered therein be distributed in accordance with and to the person or persons mentioned in the said Acts of Congress above stated?

2. Is it proper for the Supreme Court of this state to direct the distribution of the proceeds of such an action, not according to the terms of said Acts of Congress, but in accordance with the laws of the State of New York relating to the distribution of personal property?

3. In a proceeding brought in the Supreme Court of this state to compel the said administratrix to distribute the proceeds of the action aforesaid according to the laws of the State of New York, has the Appellate Division of said Supreme Court the power
45 to reverse an order denying such application and to remit the matter to the Surrogate's Court to be disposed of according to § 1903 of the Code of Civil Procedure.

And for such other and further relief, or both, in the premises, as to the court may seem just and proper.

Dated June 2nd, 1911.

Yours, etc.,

FRANK LYBOLT,
Attorney for said Administratrix.

Office and Post Office Address, Port Jervis, New York.

To Edward Frank Glover, Esq., Attorney for said Petitioner.

46 *Affidavit in Support of Motion on Leave to go to Court of Appeals.*

Supreme Court, Appellate Division, Second Judicial Department.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received Due to Sextus E. Taylor.

COUNTY OF ORANGE, *ss:*

Frank Lybolt, being duly sworn, says, that he is the attorney for Susan J. Taylor, as administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, in the above entitled proceeding.

That such proceeding was commenced to compel said administratrix to pay over to Sextus E. Taylor, the petitioner therein, one-half of the proceeds of a certain action commenced by said administratrix against the Erie Railroad Company to recover damages for the death of her intestate, which said action was brought in the Supreme Court of the State of New York in and for the County of Orange under and in pursuance to the Act of Congress ap-
47 proved April 22, 1908, entitled, "An Act relating to the liability of common carriers of railroad to their employees in certain cases," as amended by an Act of said Congress approved April 5, 1910, entitled, "An Act to amend an Act entitled, 'An Act relating to the liability of common carriers,'" etc., and which said action resulted in a judgment in favor of the plaintiff directing the disposition of the proceeds of said action in accordance with the terms of said Act of Congress.

That the application of the petitioner aforesaid to compel such payment was denied by the lower court, but upon appeal to this Appellate Division the order denying such application was reversed and the matter remitted to the Surrogate's Court of Orange County to be proceeded with according to § 1903 of the Code of Civil Procedure, which decision was rendered on May 5, 1911.

That the effect of said decision, as deponent verily believes, is to nullify the provisions of said Acts of Congress in so far as the same directs the distribution of damages recovered in actions brought thereunder where a concurrent remedy exists in the courts of the State of New York; and that such a question is one of considerable importance and interest to the public at large; and the particular question decided by the Appellate Division in this case so far as deponent can learn has never been determined in any way by the Court of Appeals of this State, nor is there anywhere a decision of said Court of Appeals which decides that where an action is brought under a statute giving such a remedy, the damages recovered therein must be distributed according to the terms of some other statute.

That the question of whether or not a litigant has the right to

commence an action in the courts of this state under and in
48 pursuance to the Acts of Congress aforesaid, notwithstanding there may be a concurrent remedy under the laws of this state, is of great public importance to those who are about to or may hereafter desire to bring actions such as permitted by said Acts of Congress, and a final decision of the Court of Appeals of the questions involved herein will be of great importance to litigants in the future. That the question presented by this appeal is a novel one and one which in the opinion of your deponent ought to be passed upon by the Court of Appeals, and is one of public aspect by reason of the fact that it determines the rights of litigants who attempt to obtain the benefit of the provisions of said Acts of Congress and also because of the fact that said Acts of Congress have been widely discussed by the courts of this country and are constantly being made the basis of actions of the character aforesaid, and the decision aforesaid will widely affect those so attempting to obtain the benefit thereof.

That there is a conflict in the decisions of this Department and of the Appellate Division of the Fourth Department deponent verily believes is shown by the decision of the last mentioned department in Matter of De Garamo, 86 Hun., 390.

No previous application has been made for the relief herein sought and this application is made at the first term of this Appellate Division after the decision aforesaid.

Wherefore, deponent, in behalf of the said administratrix, respectfully asks leave to appeal to the Court of Appeals from the decision of this court above recited and for the certification of the questions set out in the notice of motion hereto attached.

FRANK LYBOLT.

Sworn to before me this 2nd day of June, 1911.

WILLIAM P. GREGG,
Notary Public.

49 *Order Permitting Appeal to Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the Second Judicial Department, at Borough Hall, in the Borough of Brooklyn, on the 23rd Day of June, 1911.

Present: Hon. Almet F. Jenks, Presiding Justice.
" " Edward B. Thomas,
" " William J. Carr,
" " John Woodward,
" " Adelbert P. Rich,
Justices.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

The above named Susan J. Taylor having duly applied to the Appellate Division of the Supreme Court in and for the Second

Judicial Department for leave to appeal to the Court of Appeals from an order of the said Appellate Division entered herein on the
50 5th day of May, 1911, in the office of the clerk of the said Appellate Division which reversed an order of the Supreme Court entered in the office of the clerk of the County of Orange on the 16th day of January, 1911, denying petitioner's motion in the above entitled proceeding, and having also moved for a certificate of the said Appellate Division certifying to the Court of Appeals for its determination in the manner provided by statute certain questions, and said application having duly come on to be heard, and having been argued by Mr. Frank Lybolt, of counsel for the said Susan J. Taylor, and by Mr. Edward Frank Glover, of counsel for petitioner, and due deliberation having been had thereon, it is hereby

Ordered that the said Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, be and she hereby is allowed to appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department herein entered on May 5, 1911, and from the judgment entered thereon, in the office of the clerk of the County of Orange on the 11th day of May, 1911.

And the said Appellate Division does hereby certify that the following questions of law have arisen herein which in its opinion ought to be reviewed by the Court of Appeals and hereby certify the same to the Court of Appeals for review:—

1. Are the damages recovered in the action of Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, against Erie Railroad Company under the circumstances shown in the record herein, distributable under Section 1903 of the Code of Civil Procedure?

2. Are such damages recovered as aforesaid distributable
51 under the provisions of the Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases" as amended by an Act of said Congress approved April 5, 1910?

Enter.

ALMET F. JENKS, *P. J.*

52 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

Take notice, That Susan J. Taylor, as administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, hereby appeals by permission to the Court of Appeals of the State of New York, from the Order of the Appellate Division of the Supreme Court in

and for the Second Judicial Department entered in the Office of the Clerk of said Court on the 5th day of May, 1911, which reversed an Order of the Supreme Court entered in the Office of the Clerk of Orange County on the 16th day of January, 1911, and also from the Judgment of Reversal entered on said Order of said Appellate Division in the Office of the Clerk of Orange County on the 11th day of May, 1911, and that the following questions of law have been certified by said Appellate Division to said Court of Appeals for review:—

1. Are the damages recovered in the action of Susan J. Taylor, as administratrix of the goods, chattels and credits which were
53 of Howard E. Taylor, deceased, against Erie Railroad Company under the circumstances shown in the record herein, distributable under Section 1903 of the Code of Civil Procedure?

2. Are such damages recovered as aforesaid distributable under the provisions of the Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases" as amended by an Act of said Congress approved April 5, 1910?

Dated July 20, 1911.

FRANK LYBOLT,
Attorney for Appellant, Port Jervis, N. Y.

To Edward Frank Glover, Esq., Attorney for Respondent, and James D. McGiffert, Clerk of Orange County.

54 Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

We hereby stipulate that the foregoing papers are true copies of the original order to show cause, the petition of Sextus E. Taylor, the affidavit of Susan J. Taylor, the affidavit of Edward Frank Glover and the exhibits referred to in said moving and opposing affidavits, which were all the papers used in the Court below on the order to show cause, and of the original order made by the Hon. Martin J. Keogh, from which the appeal was taken to the Appellate Division of the Supreme Court, the notice of appeal to said court, the order made by said court and original judgment entered thereon, opinion of the Appellate Division, notice of motion and affidavit on application for leave to appeal to the Court of Appeals, together with the order made by the Appellate Division on such motion and notice of appeal to the Court of Appeals, and of the whole of said papers, and we hereby waive certification thereof.

Dated August 31st, 1911.

55 FRANK LYBOLT,
Attorney for Appellant, Port Jervis, N. Y.
EDWARD FRANK GLOVER,
Attorney for Respondent, 60 Wall Street, Borough of Manhattan, New York City, N. Y.

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57 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 16th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Twelve, Before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge presiding.
R. M. BARBER, *Clerk.*

Remittitur January 17th, 1912.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Adm'x, etc., to Turn Over Moneys, etc.

Be it remembered, that on the 11th day of September in the year of our Lord one thousand nine hundred and eleven Susan J. Taylor as administratrix, etc., the appellant in this proceeding, came here into the Court of Appeals by Frank Lybolt her attorney, and filed in the said Court a notice of appeal and return thereto from the

order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Sextus E. Taylor the respondent in said proceeding afterwards appeared in said
58 Court of Appeals by Edward Frank Glover, his attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals, this cause having been submitted by Counsel for the respective parties, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it is also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

59 Court of Appeals, Clerk's Office.

ALBANY, *January 17th*, 1912.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal of the Court of Appeals.]

R. M. BARBER, *Clerk.*

(Filed in office of Clerk of the County of Orange February 5, 1912.)

60 *Judgment.*

Supreme Court, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Money that She Received Due to Sextus E. Taylor.

An appeal having been taken to the Court of Appeals from the decision judgment and order of reversal of the Appellate Division, Second Department by Susan J. Taylor appellant,

Now on motion of Edward Frank Glover, attorney for Respondent it is

Ordered and adjudged That the order and judgment so appealed from be and the same hereby — affirmed in all particulars, and it is further

Ordered and adjudged that the respondent Sextus E. Taylor recover from Susan J. Taylor individually the sum of One Hundred and Forty-five and 30/100 Dollars as his costs and disbursements allowed in the Court of Appeals and that he have execution therefor.

Dated February 5th, 1912.

J. D. McGIFFERT, *Clerk.*

(Filed in the office of the Clerk of the County of Orange February 5, 1912.)

61–92 In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

Appellant's Brief, Respondent's Brief, and Opinion of Court of Appeals (with Dissenting Opinions).

* * * * * * *

93 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of the Application of Sextus E. Taylor &c. decided by the Court of Appeals on the 16th day of January, 1912, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 14th day of February 1912.

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:

[Seal State of New York Court of Appeals.]
[L. S.]

R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of the Application of Sextus E. Taylor, &c. decided by the said Court of Appeals on the 16th day of January, 1912, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the sigature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 14th day of Februray in the year of one thousand, nine hundred and twelve.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

94 *Opinion of Court of Appeals.*

New York Court of Appeals.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Turn Over Moneys that She Received Due to Sextus E. Taylor.

(Decided January 16, 1912.)

Frank Lybolt for appellant.
Edward Frank Glover for respondent.

HAIGHT, *J.*:

Howard E. Taylor was a locomotive fireman employed by the Erie Railroad Company and was engaged in taking a trip from Port Jervis, in this State, to Jersey City, in the State of New Jersey, when an accident occurred in this State through the wrongful act, negligence or default of the Erie Railroad Company which resulted in his

death. He left him surviving a widow and a father. He had no children or other next of kin. The widow, Susan J. Taylor, was appointed administratrix by the Surrogate's Court of Orange County, where they resided, and, as such administratrix, brought an
95 action in the Supreme Court of this State against the railroad company to recover damages for the death of her husband. The defendant in that action made a written offer of judgment for the sum of five thousand dollars. The plaintiff applied to the Surrogate's Court for its approval of the offer of compromise, and such approval was granted and judgment was entered against the defendant for that amount, which sum was paid to her by the defendant company. The decedent's father thereupon moved at Special Term in the Supreme Court for an order directing the plaintiff in that action to pay over to him one-half of the net proceeds of the judgment, in accordance with our Statute of Distribution. This motion was denied. The decedent's father appealed from the order to the Appellate Division, which court reversed the order of the Special Term and granted the motion. The question now presented to this court is as to whether the distribution of the fund should be made under the Federal statute or under the provisions of our Code of Civil Procedure. For many years the statute of this state has given a right of action to the executors or administrators of a decedent who has left him or her surviving a husband, wife or next of kin, to recover damages for the benefit of such husband, wife or next of kin for a wrongful act, neglect or default of any person or corporation by which the decedent's death was caused. Such damages, when recovered, were exclusively for the benefit of the decedent's husband or wife and next of kin, and must be distributed as if they were unbequeathed assets left in the hands of the executor and administrator after payment of all debts and expenses of administration. (Code of Civil Procedure, Sections 1902, 1903.) Under the provisions of our Constitution of 1894, Article 1, Section 18, it is provided that "the right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statu-
96 tory limitation." It consequently follows that under the provisions of our statute the widow of the decedent was entitled to one-half of the recovery and the father the other half, he being the only next of kin. Under the act of Congress relating to the liability of common carriers by railroads to their employees, approved April 22, 1908, as amended April 5, 1910, it was provided "that any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." Under the provisions of this statute the widow of the decedent would take the whole of the recovery and the father nothing. We thus have presented a conflict between the Federal and the State statutes as to the distri-

bution that should be made of the fund, and the question is as to which shall prevail.

In adopting the Federal Constitution the state delegated to Congress the power to regulate interstate commerce, and it may be conceded that with that power it may enact regulations for the control of common carriers and their employees with reference to hours of labor and safety appliances, and give a right of action to employees suffering injury through the negligence of such carriers. (Employers' Liability Cases, 207 U. S., 463.) But the power to regulate interstate commerce must end somewhere, and, so far as employees of common carriers engaged in interstate commerce are concerned, it appears to us that it must end with the death of the employee. When that event occurs all of the statutes with reference to safety appliances, hours of labor, or rights of action for injuries
97 received, become of no effect, and his estate, whatever it may be, passes to legatees and devisees, or to his widow, his heirs at law, and next of kin.

In this case the decedent died intestate. As we have seen, he left him surviving a widow and a father his only next of kin. Neither of these persons were engaged in interstate commerce or subject to any of the provisions of the statute enacted with reference to its regulations. They are residents of this state, subject to its laws and jurisdiction and possessing the rights given by its constitution and statutes. As widow and next of kin of the decedent they are deemed to have sustained pecuniary loss by his death, and such death being caused through the negligence of the Erie Railroad Company corporation, the administrator of the decedent is given the right of action in their behalf to recover the damages which they have sustained. This, it appears to us, is a right of property which Congress had no power to take from them. Our statute makes it the same as an unbequeathed asset of the estate of the decedent, which is recoverable by the administrator exclusively for their benefit. If Congress can go beyond the death of the employee and distribute the funds recovered for causing such death, we see no reason why it may not also nullify our statute providing for the descent of real estate, and also our statute providing for the distribution of his personal estate, upon the theory that his real and personal estate was acquired and paid for out of his earnings as an employee of a transportation company engaged in interstate commerce. To our minds the states never intended or contemplated the delegation of such power to Congress by the provisions of the constitution heretofore referred to. We consequently are of the opinion that the act of Congress, in so far as it attempts to distribute the funds, is invalid and unauthorized. Whether the act should be limited in its application to territories and states in which no right of action is given
98 to the widow and next of kin of persons whose death is caused through the fault of another, is not now before us, and is not considered.

Our chief judge appears to entertain the view that our own statute remains in force and that the next of kin may still maintain another action to recover the loss which has been sustained. We are unable

to concur with his view upon this question. The right of action is not given to the widow and next of kin. It is given to the administrator of the decedent for their benefit. The legislature clearly contemplated that but one action should be brought for the benefit of all the persons interested and that that action should be by the administrator. In this case the action was prosecuted by the administratrix appointed by the Surrogate's Court in this state. The complaint set forth a good cause of action under our statute. The fact that it alleged that it was brought under the act of Congress known as the Employers' Liability Act may be waived by the parties, and does not affect the question we have under consideration. True, an offer of compromise was made by the defendant, but this was submitted to the court, and its acceptance approved and judgment was entered thereon. If an action can now be maintained for the benefit of the father, it must be maintained by the administratrix, and we apprehend the action would not progress far before it would be met by the plea of a former judgment in bar. Neither our own statute nor the Federal statute ever contemplated more than one action. The Federal statute expressly provides "that there shall be only one recovery for the same injury," and it, like our own statute, gives the right of action to the executor or administrator of the decedent for the benefit of those which it specifies, the purpose being in both statutes to allow only one recovery for the same injury.

For a more elaborate discussion of the main question in the case, we refer to the learned opinion of Carr, J., in the Appellate Division.

99 We think that the order of the Appellate Division should be affirmed, with costs.

CULLEN, *Ch. J.* (dissenting):

I concur in the reversal of the order appealed from, but solely on the ground that the respondent has no interest in the fund in dispute. I am not prepared to admit the validity of the act of Congress so far as it authorizes a recovery by the personal representatives of an employee engaged in interstate commerce for damages for his death occasioned by the fault of the employer, the recovery to be apportioned among certain relatives of the deceased or next of kin dependent upon him. I do not think that proposition is involved in the decision of the Supreme Court of the United States in the Employers' Liability Cases (207 U. S., 463). Liability to the employee himself for injuries causing his death and liability to his next of kin are very different things, and the constitutional power of Congress to impose the first does not necessarily import power to impose the second. The action in favor of the next of kin is not a revival of the action in favor of the deceased, but an independent cause of action, though, if it were to be considered as a continuance of what would have been the deceased's cause of action for his injuries, had they not proved fatal, I know of no principle on which Congress can regulate the disposition of the estate of a deceased, whether he happens to be engaged in interstate commerce or not. That is solely a matter to be determined by the states. Treated as a cause of action

independent of the rights of the deceased, the next of kin are not engaged in interstate commerce, and I do not see where the power of Congress to confer a right of action in their favor is to be found. True, it may be argued that this provision in favor of his dependent relatives will tend to render the employee more alert and careful in the discharge of his duties and also exempt him from saving money out of his wages to support those dependent on him in case of accident. The argument is far fetched and would offer justification for Congress interfering in the purely domestic affairs of state in a thousand other instances so far as they relate to an employee in interstate commerce. The real objection to the statute, however, is based on the assumption that it purports to abrogate the state statute on the subject granting a right of action guaranteed by the constitution of the state and beyond legislative power to limit or deny. But the question does not arise in this case. The action was plainly brought for liability created by the act of Congress. The only one besides the plaintiff interested in the validity of the right of action given by that statute was the defendant and it chose to pay the claim. So, also, it may be that the court, following the decision in Hoxie v. New York, New Haven & Hartford Railroad Company (82 Conn., 352) might have declined jurisdiction of the suit, but it did not. If the act of Congress gives an additional cause of action or the act of Congress is invalid, in either case the right of the respondent, through the administrator, to bring an action on our own statute is not impaired. In reality the only questions with which the respondent is concerned are whether the provision in the act of Congress "there shall be only one recovery for the same injury" is applicable to causes of action under the state statute, and if so, whether it was within the constitutional power of Congress to abrogate that right of action. This can only be determined in an action to enforce the state right of action. The employer by settling the administrator's suit has not discharged or satisfied that right if it exists.

100

HINCOCK, *J.* (dissenting):

This controversy is precipitated by a conflict between the provisions of the Federal Employers' Liability Act passed April 22, 1908, and the statutes of this state, Sections 1902, 1903, Code of Civil Procedure, relative to the distribution of the damages recovered in case of death of an employee caused by the negligence of an employer. The petitioner and respondent, who is the father of the killed employee, is attempting to compel the latter's administratrix and wife to distribute the damages collected under the Federal statute in accordance with the provisions of the state statute. The difference between the two in this respect is that under the circumstances of this case all of the damages under the provisions of the Federal statute will go to the wife, whereas under the state statute as formerly written one-half will go to the father and petitioner.

101

The pertinent facts presenting the controversy are as follows:

While the intestate was employed as a locomotive fireman in running a train on the Erie Railroad which was engaged in moving

interstate commerce between New York and New Jersey, he was killed as the result of an accident caused by the alleged negligence of the railroad company. The accident occurred in New York State and at the time of his death Taylor was a resident of that state. He left him surviving his widow, no children and a father. The latter attempted to secure administration of his estate, but in the end the letters were issued to the decedent's wife, the present appellant, by the Surrogate of Orange County. As such administratrix she instituted an action against the Erie Railroad Company to recover damages caused by her husband's death and which action plainly and concededly was brought under the Federal statute already referred to. Without interposing any answer or demurrer, the defendant offered to allow judgment against it for the sum of five thousand dollars, and application by the administratrix having been made
102 to the Surrogate's Court for leave to accept said sum in settlement of the cause of action, such leave was granted, and thereafter judgment was entered in the action. Said application to the Surrogate's Court distinctly showed that the action whereof settlement was sought was brought under the Federal statute, and the judgment in the action recited the same fact and adjudged that said administratrix recover the sum of $5.000 damages "to be distributed according to the terms and conditions and to the persons as provided in said act of Congress of the United States, approved April 22, 1908," etc.

The intestate was indisputably engaged in the movement of interstate commerce at the time of his death, and, therefore, within the terms of the statute giving a cause of action to the representatives of such an employee whose death was caused by negligence of his employer. Assuming for the moment that this petitioner would be helped in his claim to moneys already collected under that statute, if it should now be held to be unconstitutional, in my opinion we must hold that that question is not open. Since the decision of the Employers' Liability Cases (207 U. S., 463), involving the constitutionality of the original Employers' Liability Act of June 11, 1906, I think we must concede the power of Congress to legislate concerning the liability of common carriers and employers engaged in interstate commerce. It is true that the cases in question might have been decided without passing on this question. Nevertheless, the court did so deliberately and fully enter upon its discussion that we must believe that it then committed itself for the future to the view expressed by a majority of its members that Congress has power to legislate upon this subject. In addition, the principles approved in that discussion are necessarily involved in the later decision of the same court upholding the constitutionality of a far-reaching statute passed by Congress requiring the use of safety appliances on
103 "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce," etc. (Southern Ry. Co. v. U. S., 222 U. S., 20.)

But it is urged that although Congress may have the power to give a right of action to the employee himself, it has no power to regulate the disposition of the damages recoverable in such an action

as this, whether the cause of action be considered as a continuance of what would have been the decedent's cause of action for his injuries had they not proved fatal, or as a cause of action independent of the rights of the deceased. On the first assumption it is argued that Congress could not regulate the disposition of the estate of the deceased even though he had been engaged in interstate commerce, and on the second assumption it is urged that the next of kin are not engaged in interstate commerce, and no power is to be found in Congress to confer a right of action in their favor. It seems to me that this argument of the lack of power cannot be maintained; that it only regards some incidental features of the legislation before us and overlooks the substantial nature, basis and object thereof.

It is doubtless true that Congress would not have the power to regulate the disposition of the estate of a deceased simply because he had been engaged in interstate commerce. It is also true that the personal representatives of the deceased were not engaged in interstate commerce and therefore, ordinarily subject to the power of Congress. But the defendant railroad company which was guilty of wrongdoing and the employee who suffered injuries as the result of such wrongdoing were engaged in, and the wrongdoing occurred in the prosecution of interstate commerce, and those very essential facts must be given their proper place and importance in determining whether Congress could properly pass the act which it did.

Congress has power to regulate interstate commerce. As
104 an incident to and for the purpose of doing this it must be regarded as settled that it may regulate the relation of master and servant. It may, amongst other things, limit hours of labor and require various safety appliances. For the sake of enforcing these latter regulations it may prescribe criminal and civil penalties as a punishment for disobedience. It seems to be regarded by my associates as settled that as a further means of enforcing proper conduct by the employer it may impose on him a liability in damages in favor of the employee. What difference in principle is there then between a statute which in aid of the proper regulation and movement of interstate commerce makes the employer guilty of negligent or wrongful conduct liable in damages to the injured employee, and one which makes him liable in an action by the representatives of the employee where the injuries to the latter have produced death? The important consideration as I understand it is that the employer shall be held up to an observance of a proper and safe attitude toward his employee whereby better conditions of interstate commerce may be secured and it seems to me assuming as we must that legislation conferring a right of action on the employee would be proper as tending to secure this result, it would be arbitrary rather than logical to hold that an act conferring a similar right of action on the personal representatives of the employee in case he was killed could not possibly serve any such purpose, and, therefore, was unconstitutional. It would on the contrary, seem to me to be a defect in legislation if it provided simply for a case of injury to an employee without death and failed to provide for one which caused death.

Assume that Congress had passed a law requiring the use of certain spark arresters on engines hauling interstate commerce and making the railroad liable for all damages from fire in case of failure to use the same, would it be a defense to an action brought under
105 the statute by one whose property had been burned that he was not engaged in interstate commerce and that, therefore, the act was unconstitutional?

Of course, if Congress had the power to create an independent cause of action by the representatives of the deceased employee for damages sustained by the next of kin, it still more clearly had the right to enact that the employee's cause of action should survive in case of death and be enforceable by his representatives.

The statute at the time of injury and death of appellant's intestate provided for the maintenance of an action by his representatives on both theories, and the complaint filed by her was so general as to be adjustable to either, and, therefore, on this application she can assert the validity of the statute on either theory, for the two provisions are entirely separable and distinct.

But while Congress had the power to give to the representatives of the deceased employee a cause of action as it did, such cause of action on the other hand was absolutely dependent on said statute and did not exist without it. This is equally so as to an independent cause of action in favor of the representatives for damages sustained by reason of the death of the employee and as to the right of action preserved to them by survival in the sense contemplated by the statute. This being so, it must follow that the same power which conferred a favor and privilege had the right also to prescribe the conditions under which the same should be enjoyed and to dictate how and for whose benefit the damages which the representatives recovered under the statute should be distributed. That principle is so familiar as not to require elaboration. It is very different from the general proposition which is discussed by my associates that Congress ought not to have the power to prescribe how the estate of a deceased person should be distributed merely because he
106 had been engaged in interstate commerce or because it consisted in part of wages which he had earned while engaged in such business. Those observations of course are self-evident where the estate and the wages earned are not the proceeds of some purely statutory right, but where a legislative body has the power to create a cause of action I take it that it must have the power within certain limits not transgressed here to dictate the persons for whose benefit that cause of action shall be enforced.

It is argued in the opinion of the learned Appellate Division that it could not have been the intention of Congress to supplant the laws of such states as already afforded a remedy as adequate as that which it granted and that, therefore, the act in question should be construed as one granting a new remedy under certain circumstances where none or a less adequate one existed under the state laws.

The trouble with this argument is that it is irreconcilably opposed to the plain meaning of the statute. Congress having the power to do so has adopted a statute which in its terms is so com-

plete and comprehensive as not to permit of any such limited construction and application as is suggested. To give such an interpretation would be to engraft on the statute a broad and unauthorized amendment.

The adoption of the conclusions which I have expressed concerning the power of Congress to make the enactments which have been considered does not indicate any failure to appreciate the argument of inconvenience which is made. One can easily see that it may and probably will be productive of much embarrassment, uncertainty and confusion if Congress shall attempt to legislate concerning a variety of subjects similar to the present one which very well might be left to state control and legislation. But this thought was fully considered by Mr. Justice White in his opinion in the Employers' Liability cases already referred to and dismissed with the unanswerable observation in substance that this was a consid-
107 eration which very well might be addressed to Congress before enactment of such legislation, but which could not be urged as a sufficient reason for not enforcing it after validly enacted.

While I do not regard it as material at this time, I doubt if the provision in the amendment to the Federal statute approved April 5, 1910, that "in such case there shall be only one recovery for the same injury," has any such force to bar actions under the state statute as Judge Haight seems to give to it. The original statute in its first section had provided that any offending common carrier should be liable in damages to any person suffering injury while employed by such carrier, and in case of his death to his personal representatives. Then by the amendment at the date mentioned it was provided that the right of action so given to an employee should survive to his personal representatives for the benefit of certain people, and then, as already stated, that there shall be only one recovery for the same injury. In my opinion this simply refers to, and prohibits the possibility of, double recoveries under the Federal statute and nothing else.

I now come to the second answer which may be made to the petitioner's application in this matter and which seems to be conclusive. Even if it should be assumed that the act of Congress is unconstitutional and invalid, he has no interest in and cannot take advantage of that fact on this application. The appellant as plaintiff brought her action fairly and distinctly under the Federal statute for the cause of action thereby given. If the statute was unconstitutional it was the privilege and duty of the defendant to defend the action and raise that defense. It did not do this, but made an offer of judgment for the cause there alleged, and by and with the authority of the Surrogate's Court the administratrix accepted that offer and now has the money on hand. There was no general settlement of damages which the administratrix might have because of
108 the death of her intestate, and which might be regarded as distributable under the state statute if the Federal one was invalid, but simply and solely an offer of judgment as stated. If it turn out that the Federal statute is unconstitutional, the defendant possibly may be in peril from another action under the state statute.

That question I do not regard it as necessary to determine. But one thing is clear. This petitioner cannot insist that moneys which have been collected by the administratrix under the Federal statute as a constitutional and valid enactment shall now be distributed by her under the state statute on the ground that the Federal legislation was unconstitutional and invalid.

Practically the same answer lies to the final contention of the petitioner, that the Federal statute in various respects so runs counter to the policy of our laws, reference being made not only to the distribution of damages under it, but also to the rules adopted concerning the defenses of contributory negligence and assumption of risk, that our courts on principles of comity should refuse to aid a suitor seeking to enforce it.

There can be no doubt that the state courts have power to entertain an action for the enforcement of this statute. The statute itself enacted and assumed that they should and would have such jurisdiction, and the general rule is that although exclusive jurisdiction for the enforcement of statutes of the United States may be given to the Federal courts, yet where it is not given either expressly or by necessary implication state courts having competent jurisdiction in other respects may be resorted to. (Claflin v. Houseman, 93 U. S., 130.)

Assuming, however, simply for the sake of argument and without at all so deciding, that our courts although having power to entertain jurisdiction, might have declined so to do on general grounds of comity, it seems to me that the petitioner if on any possible theory he earlier might have had standing for that purpose, is now in no position to urge that right and possibility as a ground for his application. If the proper reasons existed for refusing to entertain jurisdiction, our courts might have done so either on their own motion or on the demand of the defendant by way of answer to the complaint. They did neither, but received the plaintiff within their jurisdiction and assisted her to collect her damages under the Federal statute, and the money is on hand for distribution thereunder. Therefore, it is not a question whether they will entertain jurisdiction. It is a fact that they have entertained it, and opportunity for any argument on this point has passed beyond recall.

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For these reasons the order appealed from must be reversed and that of the Special Term affirmed, with costs.

Werner, Willard Bartlett and Chase, JJ., concur with Haight, J.; Cullen, Ch. J., and Hiscock, J., read dissenting opinions; Vann, J., concurs with Cullen, Ch. J.

Order affirmed.

* * * * * * *

In the Matter of the Application of SEXTUS E. TAYLOR, Defendant in Error, Against and to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, Plaintiff in Error, to Turn Over Moneys that She Received and which are Claimed to be Due said Sextus E. Taylor, Defendant in Error.

And now comes Susan J. Taylor, as administratrix of the goods, chattels and credits of Howard E. Taylor, deceased, Plaintiff in Error, and makes and files this her assignment of errors:

I. The Court of Appeals of the State of New York by its order, entered and filed February 5, 1912, and by the judgment entered thereon, erred in adjudging and deciding that the money recovered in an action, which was duly and properly brought and prosecuted solely under the Act of Congress of the United States, approved April 22, 1908, entitled, "An Act relating to the liability of common carriers of railroad- to their employés in certain cases", must be distributed in equal shares to the surviving wife and father of the deceased employé under and in accordance with the provisions of the Statutes of the State of New York and that the provision of said Act of Congress, providing for a different distribution so that the whole of said recovery would go to the widow to the exclusion of the father, is unconstitutional and invalid.

II. The said Court of Appeals by its said order, and by the judgment entered thereon, erred in adjudging and deciding that
125 the said Act of Congress is unconstitutional and invalid either in whole or in part.

III. The said Court of Appeals by its said order, and by the judgment entered thereon, erred in adjudging and deciding against the said Susan J. Taylor and in favor of said Sextus E. Taylor for the reason that there was drawn in question before said Court of Appeals and in each of the Courts below the validity of said Act of Congress, approved April 22, 1908, and the decision of said Court of Appeals is against the validity of said Act.

IV. The said Court of Appeals by its said order, and by the judgment entered thereon, erred in adjudging and deciding against the said Susan J. Taylor and in favor of said Sextus E. Taylor for the reason that there was drawn in question before said Court of Appeals and in each of the Courts below the validity of the Statutes of the State of New York, and particularly the Statutes of that State which are at times applicable to the distribution among the next of kin of the proceeds of an action brought to recover damages for the death of a person occasioned by wrongful act or negligence, on the ground that said State Statutes are repugnant to section or sub-division numbered 1 of said Act of Congress, and the decision of said Court of Appeals is in favor of the validity of said State Statutes and against the validity of that part of said Act of Congress.

V. The said Court of Appeals by its said order, and by the judg-

ment entered thereon, erred in adjudging and deciding against the said Susan J. Taylor and in favor of said Sextus E. Taylor for the reason that such order and judgment necessarily decided, and could not have been so granted without determining, that the Act of Congress, approved April 22, 1908, is unconstitutional and invalid, in whole or in part, and that the New York State Statutes are
126 valid and controlling to the exclusion of said Act of Congress, notwithstanding that the money which forms the subject of this suit or proceeding was wholly recovered in an action based solely and properly upon the said Act of Congress.

VI. The said Court of Appeals by its said order, and by the judgment entered thereon, erred because it did not by its decision reverse the order and judgment of the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department and because it did not affirm the order of the Supreme Court of the State of New York at Special Term for the reason that there was drawn in question before said Court of Appeals and in each of the Courts below the individual title and right of the said Susan J. Taylor under said Act of Congress, approved April 22, 1908, to the whole of the recovery for the death of her husband and intestate and the said decision and order of the said Court of Appeals is against the said title and right specially set up and claimed by said Susan J. Taylor.

VII. There was certified to the said Court of Appeals for review by the Appellate Division of the Supreme Court of the State of New York the question, "Are the damages recovered in the action of Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, against Erie Railroad Company under the circumstances shown in the record herein, distributable under Section 1903 of the Code of Civil Procedure," which question the said Court of Appeals in effect answered in the affirmative, and in so answering such question the said Court
127 of Appeals erred for the reason that the circumstances shown in the record herein are that the said Susan J. Taylor, as adm'x, etc., had recovered a judgment and collected thereon in an action which she had properly brought and prosecuted solely under said Act of Congress, approved April 22, 1908, and that under the provisions of that Act she alone and individually is entitled to the whole of said recovery because her intestate died leaving no children but only herself as widow and his father.

VIII. There was also certified to said Court of Appeals for review by said Appellate Division the question, "Are such damages recovered as aforesaid distributable under the provisions of the Act of Congress of the United States, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases" as amended by an Act of said Congress approved April 5, 1910," which question the said Court of Appeals in effect answered in the negative, and in so answering such question the Court of Appeals erred for the reason that the damages referred to in such question were recovered in an action which was properly brought and prosecuted solely under said Act of Congress,

approved April 22, 1908, and thereafter the damages are properly distributable under that Act and none other, and the denial by said Court of Appeals to said Susan J. Taylor of that right on the ground that so much of said Act of Congress is unconstitutional and invalid is error.

IX. The said Court of Appeals erred in declining to enforce and apply the said Act of Congress and the whole thereof because of its conflict with the New York State Statutes or because of any other reason.

128 X. The Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department erred in reversing the order of the Supreme Court of the State of New York at Special Term for each of the reasons hereinbefore separately stated.

Wherefore, the said Susan J. Taylor, as adm'x etc., prays that the order of the Court of Appeals aforesaid, and the judgment entered thereon, be reversed, annulled and altogether held for naught, that the order and judgment of the said Appellate Division be also reversed, annulled and altogether held for naught, that the order of the Supreme Court of the State of New York at Special Term be affirmed, and that she may be restored to all things which she has lost because of the suit or proceeding and because of said orders and judgments respectively for the Court of Appeals and the Appellate Division.

WILLIAM VANAMEE,
Attorney for Plaintiff in Error, Susan J. Taylor, as Adm'x, etc., 64 Second Street, Newburgh, New York.

129–132 [Endorsed:] 28/115. United States Supreme Court. In the Matter of the Application of Sextus E. Taylor, Defendant in Error, against and to Compel Susan J. Taylor, as Adm'x, etc., Plaintiff in Error, to turn over moneys, etc. Assignment of Errors. William Vanamee, Attorney for Plaintiff in Error, Susan J. Taylor, as Adm'x, etc., 64 Second Street, Newburgh, New York. Read on Application for Writ of Error. February —, 1912, ——, Asso. Jus. Sup. Ct. U. S. Filed Feb. 20, 1912, 11.30 a. m.

* * * * * * *

133 UNITED STATES OF AMERICA, ss:

To Sextus E. Taylor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Susan J. Taylor, as Administratrix of the goods, chattels, and credits which were of Howard E. Taylor, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand nine hundred and twelve.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

134 [Endorsed:] 28/115. Filed Feb. 20, 1912, 11.30 a. m.

Personal service of a copy of the within citation is hereby admitted this 20th day of February 1912.

EDWARD FRANK GLOVER,
Att'y for Sextus E. Taylor.

135–140 Supreme Court of the State of New York, Orange County.

In the Matter of the Application of SEXTUS E. TAYLOR to Compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, Deceased, to Pay Over Money Claimed to be Due said Sextus E. Taylor.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 2 Rector Street, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Sextus E. Taylor in the sum of five thousand dollars ($5000), lawful money of the United States to be paid to the said Sextus E. Taylor; for which payment, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal. Dated this fifteenth day of February, Nineteen hundred and twelve.

Whereas, the above-named Susan J. Taylor as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, has prosecuted, or is about to prosecute her writ of error to the United States Supreme Court to reverse an order and judgment rendered in the above entitled suit or proceeding respectively by the Court of Appeals of the State of New York and the Supreme Court of the State of New York, which said order and judgment was filed and entered in the office of the Clerk of the County of Orange, New York, on or about the 5th day of February, 1912.

Now, therefore, the condition of this obligation is such, that if the said Susan J. Taylor as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, shall prosecute her said writ of error to effect, and answer all damages and costs if

she fails to make her plea good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

Sealed and delivered this 15th day of February, 1912.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney-in-Fact.*

Approved February 16, 1912.
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

* * * * * * *

141 SUPREME COURT,
State of New York, County of Orange, ss:

I, James D. McGiffert, Clerk of the Supreme Court of the State of New York in and for the County of Orange, do hereby certify that there was lodged with me as such Clerk on the twentieth day of February, 1912, in the case entitled "In the Matter of the Application of Sextus E. Taylor, to compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, deceased, to turn over moneys that she received, due to Sextus E. Taylor":

I. Original bond of which a true copy is herein set forth.
II. Original Writ of Error.
III. Original Petition for Writ of Error.
IV. Original Assignment of Errors.
V. Original Prayer for Reversal.
VI. Original Citation on Writ of Error and Admission of Service endorsed thereon.

On the first day of March, 1912, in the above entitled action true copies of each and all of the above papers, excepting the bond, were lodged with me.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the Village of Goshen, Orange County, New York, this 1st day of March, in the year of our Lord one thousand nine hundred and twelve.

[Orange County Seal.]

[SEAL.] J. D. McGIFFERT, *Clerk.*

142 SUPREME COURT,
State of New York, County of Orange, ss:

I, James D. McGiffert, Clerk of the Supreme Court of the State of New York in and for the County of Orange, do hereby certify that the foregoing pages, numbered from one to sixty inclusive, are a true, full and complete transcript of the record and proceedings in the case entitled "In the Matter of the Application of Sextus E. Taylor, to compel Susan J. Taylor, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, deceased, to turn over

moneys that she received due to Sextus E. Taylor", and also a duly certified copy of the briefs in the Court of Appeals of the respective parties hereto, a duly certified copy of the opinion of the Court of Appeals with the dissenting opinions, the original Writ of Error, the original Petition for Writ of Error, the original Assignment of Errors, the original Prayer for Reversal, and the original Citation on Writ of Error and Admission of Service endorsed thereon, and also a true, full and complete copy of the Bond, and Consent and Order of Substitution as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed in the Village of Goshen, New York, on the first day of March, in the year of our Lord one thousand nine hundred and twelve.

[Orange County Seal.]

[SEAL.]

J. D. McGIFFERT, *Clerk.*

143 In the Supreme Court of the United States, October Term, 1911.

No. 1065.

SUSAN B. TAYLOR, Administratrix of William E. Taylor, Plaintiff in Error,

vs.

SEXTUS E. TAYLOR.

On Writ of Error to the Court of Appeals of the State of New York.

Stipulation.

In printing the transcript of record in the above case for the use of the Supreme Court of the United States, the Clerk of said Court will please omit the following papers:

1. Briefs for appellant and respondent, respectively, filed in the Court of Appeals of the State of New York, together with the certificate of the Clerk of said Court appended thereto, said briefs and certificates appearing at manuscript pages 62 to 92 inclusive of the transcript of record on file.

2. Petition for writ of error and endorsements, manuscript pages 110 to 123 inclusive.

3. Prayer for reversal and endorsements, manuscript pages 130 to 132 inclusive.

4. Statement of financial condition of Fidelity and Deposit Company (surety on bond) and endorsements, manuscript pages 136, 137.

144 5. Order for substitution and entry of appearance of Mr. Vanamee and endorsements, manuscript pages 138, 139.

F. D. McKENNEY,
Attorney for Plaintiff in Error.
EDWARD FRANK GLOVER,
Attorney for Defendant in Error.

145 [Endorsed:] 1065/23141. October Term, 1911. #1065. Supreme Court of the United States. Susan B. Taylor, Administratrix, vs. Sextus E. Taylor. Stipulation as to Omissions from Transcript of Record. Law Offices of Wayne MacVeagh, Frederic D. McKenney, John Spalding Flannery, William Hitz, G. Bowdoin Craighill, Ninth Floor, Hibbs Building, 723 Fifteenth Street, Washington, D. C.

146 [Endorsed:] File No. 23,141. Supreme Court U. S. October Term, 1911. Term No. 1065. Susan J. Taylor, as Adm'x, etc., Pl'ff in Error, vs. Sextus E. Taylor. Stipulation to omit parts of record in printing. Filed May 7, 1912.

Endorsed on cover: File No. 23,141. New York Supreme Court. Term No. 1065. Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, plaintiff in error, vs. Sextus E. Taylor. Filed March 30th, 1912. File No. 23,141.

In the Supreme Court of the United States,

OCTOBER TERM, 1911.

In the Matter *of* The Application of SEXTUS E. TAYLOR, to compel SUSAN J. TAYLOR, as Administratrix of the Goods, Chattels and Credits which were of Howard E. Taylor, deceased, to turn over moneys that she received, due to SEXTUS E. TAYLOR.	No. 1065.

IN ERROR TO THE SUPREME COURT, COURT OF APPEALS OF THE STATE OF NEW YORK.

Motion to Advance.

Comes now Sextus E. Taylor, the defendant-in-error, and moves the Court to advance the above-entitled cause for hearing at this Term.

The writ of error is from a final order of the Court of Appeals of the State of New York, entered January 16th, 1912, which disposes of damages recovered in the action of Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, against the Erie Railroad Company under the circumstances shown in the record under Section 1903 of the Code

of Civil Procedure of the State of New York, and **not** under the provisions of the Act of Congress of the United States, approved April 22nd, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases," as amended by an Act of said Congress approved April 5, 1910.

(1) *This motion:*

A motion has been made to advance case No. 1065 in accordance to Rule 26, Subdivision 7, and Rule 32.

(2) *The special and peculiar circumstances are as follows:*

Howard E. Taylor, deceased, was killed August 5th, 1910, and section 1902 of the Code of Civil Procedure of the State of New York gives a cause of action to the heirs and next-of-kin for damages, and limits the time to two years from the date of death.

(3) *Reasons for the suggestions:*

Should this Court hold in this cause that the damages received by the administratrix from the Erie Railroad Company shall all go to the widow, and the decision shall not be handed down until after August 5th, 1912, the two years' Statute of Limitation would have expired and the defendant-in-error would then be barred by the Statute of Limitation from proceeding against the Erie Railroad Company to recover his property lost by the delay.

(4) In the dissenting opinion of Mr. Justice Cullen, Ch. J., of the Court of Appeals, by way of *obiter dictum*, says:

"If the Act of Congress gives an ad-

> ditional cause of action, * * * the right of respondent (defendant-in-error here) through the administrator to bring an action on our own statute is not impaired. The employer, by settling the administrator's suit, has not discharged or satisfied that right if it existed."

The right to which is referred, is the right of action guaranteed by the Constitution of the State, and beyond legislative power to limit or deny (Sec. 18, Art. I of the Constitution of the State of New York).

(5). Mr. Justice Haight, writing the prevailing opinion for the Court of Appeals, does not share the view of the Chief Judge, and says that

> "If an action can now be maintained for the benefit of the father (who is the defendant-in-error here) it must be maintained by the administratrix, and I apprehend the action would not progress far before it would be met by the plea of a former judgment at bar."

(6) *Chaotic state exists among members of bar:*

Since this Court in these actions has handed down its decision January 15th, 1912, Mr. Van Devanter reading the opinion holding the Federal Liability Act of April 22nd, 1908, constitutional, and thereafter these opinions by the Court of Appeals of the State of New York it has been discussed at great length by the bar all over the United States and by the press. The New York Law Journal publishes the following editorial on February 9th, 1912:

> "By the decision in the Employers' Liability Cases (January, 1908, 207 U. S., 463)

the Supreme Court of the United States held the Employers' Liability Act of June 11, 1906, unconstitutional because it attempted to impose upon common carriers engaged in interstate commerce a liability in favor of any of their employees, without qualification or restriction as to the nature of the business of employment at the time of the injury. A majority of the court took the view that one engaging in interstate commerce does not thereby submit all his business to the regulating powers of Congress; and that the subjects within and those beyond the authority of Congress were so interblended that they were incapable of separation. A perusal of the opinion shows that while a majority agreed that the inclusion of matters of interstate commerce avoided the Act of 1906, there was a great deal of conflict of opinion as to just how far Congress might go in the regulation of the relations between master and servant.

The objections to the Act of 1906 were obviated in the Employers' Liability Act of April 22, 1908, which has now been given a clean bill of health by a unanimous decision of the Supreme Court in *Mondou* vs. *N. Y., N. H. & H. R. R.* (January, 1912, 32 Sup Ct R., 170).

The full text of that act and also of the further Act of April 5, 1910, amending it, are included in the statement of facts prefacing the opinion of Mr. Justice Van Devanter. The statutes affect only common carriers by railroad and the indemnity is extended only for damages to any person (and his representatives) 'suffering injury while he is em-

ployed by such carrier in such (interstate) commerce.' It is held that the abrogation of the fellow-servant rule and material restriction of the defenses of contributory negligence and assumption of risk were within Congressional power; that the act is not objectionable because an employee engaged in interstate commerce may be indemnified, although injured through the negligence of an employee engaged in intrastate commerce; that inhibition of contracts of exemption from liability is not in violation of the Fifth Amendment of the Constitution and that said Fifth Amendment is not violated through a discrimination between interstate carriers by railroad and other interstate carriers and their respective employees—even assuming that the due-process-of-law clause of the Fifth Amendment is equivalent to the provision of the Fourteenth Amendment securing the equal protection of the laws. It is also held that the laws of the several States in so far as they cover the same field were superseded by the Congressional enactment of 1908, and that the enforcement of rights under such statute cannot be regarded as impliedly restricted to the Federal Courts, the latter holding being made especially in view of the amendment of April 5, 1910, which, among other things, provides that:

'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.'

On the question of superseding laws of the several States the present decision is similar to that of the same court in *Southern R'y* vs. *Reid*, handed down a week before (32 Sup. Ct. R., 140), where it is held that Congress has so completely taken control of the subject of rate making and charging by the provisions of the act to regulate commerce and the amendments thereof as to invalidate the provisions of N. C. Code 1905, Section 2631, so far as they penalize the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the State where no rate for such shipment has been established, filed, or published. So, also, in *Northern Pacific R'y* vs. *State of Washington*, decided January 9, 1912 (32 Sup. Ct. R., 160), it was held that Congress had so acted upon the subject of the hours of labor of interstate railway employees by enacting the House of Service Act of March 4, 1907 (34 Stat. at L. 1415, Chap. 2939, U. S. Comp. Stat. Sup., 1909, p. 1170), as to preclude a State during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees a local regulation limiting hours of labor.

Upon the issue of the duty of State courts to assume jurisdiction the remarks of the Supreme Court in the Mondou case conclude:

'We are not disposed to believe that the exercise of jurisdiction by the State courts will be attented by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a juris-

diction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

The present decision, with its radical exposition of the plenary power of Congress as long as legislation is kept within the regulation of interstate commerce, renders a further decision desirable in order to settle the question discussed by the New York Court of Appeals in Matter of the Application of Sextus E. Taylor (N. Y. L. J., January 31, 1912). The majority of the Court seem to be of opinion as was the Supreme Court of Connecticut (*Hoxie* vs. *R. Co.*, 82 Conn., 352), that the power of Congress necessarily ended with the death of an intestate. Upon the authority of Congress to distribute the benefit under a cause of action which it creates—although former similar causes under State

law may be superseded—the following language from Judge Hiscock's dissenting opinion is certainly cogent:

'But while Congress has the power to give to the representatives of the deceased employee a cause of action as it did, such cause of action, on the other hand, was absolutely dependent on said statute and did not exist without it. This is equally so as to an independent cause of action in favor of the representatives for damages sustained by reason of the death of the employee and as to the right of action preserved to them by survival in the sense contemplated by the statute. This being so, it must follow that the same power which conferred a favor and privilege had the right also to prescribe the conditions under which the same should be enjoyed and to dictate how and for whose benefit the damages which the representatives recovered under the statute should be distributed. That principle is so familiar as not to require elaboration. It is very different from the general proposition which is discussed by my associates that Congress ought not to have the power to prescribe how the estate of a deceased person should be distributed merely because he had been engaged in interstate commerce or because it consisted in part of wages which he had earned while engaged in such business. Those observations of course are self-evident where the estate and the wages earned are not the proceeds of some purely statutory right, but where a legislative body has the power to create a cause of action I take it that it must have the power within certain limits not transgressed here to dictate the

persons for whose benefit that cause of action shall be enforced.'"

(7) *For further special and peculiar circumstances shown to this Court to advance this cause:*

Is the interest and anxiety on the part of the members of the bar for a speedy and further decision on this "act" so that they might be able to begin a proper action and in the first instance not be barred by the Statute of Limitation waiting for a final determination of an action chosen to be brought in place of bringing the action another way.

(8) *Reason under Rule 32.*

For a further separate and distinct reason this cause should be advanced.

The only question at issue is the question of the jurisdiction of the Court below, to wit: the Court of Appeals of the Supreme Court of the State of New York.

The Court of Appeals of the State of New York has jurisdiction to say whether or no the money in the hands of the administratrix should be distributed under the circumstances shown in the record under Section 1903 of the Code of Civil Procedure of the State of New York.

Respectfully submitted,

EDWARD FRANK GLOVER,
Attorney for Defendant-in-Error.

April 3rd, 1912.

Notice is hereby given that the foregoing motion will be presented at the opening of Court upon May 6th, 1912, or as soon thereafter as counsel can be heard.

Edward Frank Glover
Attorney for Defendant in error

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 224.

SUSAN J. TAYLOR, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF HOWARD E. TAYLOR, DECEASED, PLAINTIFF IN ERROR,

vs.

SEXTUS E. TAYLOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

The basic action was brought in an appropriate court of the State of New York by Susan J. Taylor as administratrix of her deceased husband, Howard E. Taylor, to recover from the Erie Railroad Company, under the provisions of the act of Con-

gress of April 22, 1908 (35 Stats. L., 65, chap. 149), as amended by the act of Congress of April 5, 1910 (36 Stats. L., 291, chap. 143), damages laid in the sum of $5,000, for the alleged wrongful death of the deceased, a locomotive fireman, while in the employ of the Company and as the result of its negligence. By agreement between the parties to that proceeding judgment went for the plaintiff in the sum specified (R., 14) and was later satisfied by payment of said sum with taxed costs. Subsequently Sextus E. Taylor, the defendant in error here, filed petition (R., 2-5) in the Supreme Court of New York for Orange County to compel the above-named administratrix to pay over to him, as father of the deceased, one-half of the proceeds of said judgment, his claim in such regard being founded upon section 98, subdivision 7 of chapter 13 of the Consolidated Laws (Decedent Estate Law, Laws of 1909, chap. 18) of the State of New York, which reads:

> "If a deceased leaves a father and no child or descendant, the father shall take one-half, if there be a widow."

The surrogate, upon consideration and after hearing, denied said petition and adjudged and ordered said administratrix to pay to herself, as the widow and sole dependent of Howard E. Taylor, deceased, "the net proceeds of the above judgment," to which said sum the said Susan J. Taylor, individually, is solely entitled under and by

virtue of the provisions of said act of Congress" (R., 15).

From this order Sextus E. Taylor appealed to the Appellate Division, Second Department (R., 16), and upon hearing there said order was reversed (R., 17), that court holding "that the complaint on which the administratrix of the decedent came into our (State) courts set forth facts which constituted a cause of action under the laws of this State" (R., 22), and, even assuming the validity of the Federal statutes relied on by the administratrix, "it is certainly questionable that Congress intended to supplant the laws of such States as afforded already a remedy as adequate as that which it granted itself. * * *" We are of opinion that the act of Congress in question should be considered as one granting a new remedy, under certain circumstances, where none or a less adequate one, existed under the State laws, and as not intended to supplant or abrogate a right of action of practically equal extent existing under the laws of this State. It is only on the theory that this act of Congress constitutes the exclusive rule applicable to the facts of the case before us that the order of the Special Term can be upheld. If the remedy afforded by our laws be concurrent with that provided by Congress, then we think that our public policy will not permit an administratrix appointed by our courts under our laws to use the Federal statute simply for the purpose of defeating our statute of distribution of personal property" (R., 23).

From these conclusions and the judgment conforming thereto entered May 11, 1911, an appeal was allowed to the Court of Appeals upon the following questions which were certified for review:

> "1. Are the damages recovered in the action of Susan J. Taylor as administratrix of the goods, chattels, and credits which were of Howard E. Taylor, deceased, against Erie Railroad Company under the circumstances shown in the record herein, distributable under section 1903 of the Code of Civil Procedure?
>
> "2. Are such damages recovered as aforesaid distributable under the provisions of the act of Congress of the United States, approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases' as amended by an act of said Congress approved April 5, 1910" (R., 27, 28)?

After consideration said Court of Appeals affirmed the order of the Appellate Division and the judgment appealed from with costs and remitted the case to the Supreme Court of the State to be proceeded upon according to law (R., 30), and judgment of the latter court was entered conformably thereto (R., 31).

In the Court of Appeals four of the seven judges concurred in the above action, while three thereof voted for reversal, the minority differing among themselves as to the reasons for their action (R., 41). The majority opinion, first stating that the

"question now presented to this court is as to whether the distribution of the fund should be made under the Federal statute or under the provisions of our Code of Civil Procedure" (R., 33), and after declaring that "the power to regulate interstate commerce must end somewhere, and, so far as employees of common carriers engaged in interstate commerce are concerned, it appears to us that it must end with the death of the employee," concludes "that the act of Congress, in so far as it attempts to distribute the funds, is invalid and unauthorized" (R., 34).

To review the last above-mentioned judgment writ of error issued out of this court, on assignments of error (R., 42), which may be summed up as follows:

Assignment of Error.

It was error both on the part of the Court of Appeals and of the Supreme Court, Appellate Division, of the State of New York, to hold that the net proceeds of the judgment recovered in the action of Susan J. Taylor, as administratrix of the goods, chattels and credits which were of Howard E. Taylor, deceased, against the Erie Railroad Company, under the circumstances shown in the record herein, were not distributable under the provisions of the act of Congress of the United States, approved April 22, 1908, as amended April 5, 1910, commonly referred to as the Federal Employers' Liability Act.

BRIEF.

Upon authority of the opinions and judgments of this court in

Mondou *vs.* New York, N. H. & H. R. Co., 223 U. S., 1.

Missouri, Kansas & Texas R. Co. *vs.* Wulf, 226 U. S., 570, 576.

Michigan Central R. Co. *vs.* Vreeland, 227 U. S., 59, 67.

American R. Co. *vs.* Didrickson, 227 U. S., 145, 149.

Gulf, &c., R. Co. *vs.* McGinnis, 228 U. S., 173, 175.

St. Louis, Iron M. & S. R. Co. *vs.* Hesterly, Admr., 228 U. S., 702.

St. Louis, &c., R. Co. *vs.* Seale, 229 U. S., 156, 158, 162,

the judgment of the State court herein complained of was wrong and should be reversed with instructions to reinstate the judgment of the special term of the Supreme Court of New York in favor of Susan J. Taylor, which was entered on the 10th day of January, 1911 (R., 14-15), and was first appealed from.

In Mondou *vs.* New York, N. H. & H. R. Co., 223 U. S., 1, the constitutionality of the act of Congress of April 22, 1908 (35 Stats. L., 65, chap.

149), was upheld, and, quoting from Smith *vs.* Alabama, 124 U. S., 465, 473, it is there said:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations, and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

> "True, prior to the present act (of April 22, 1908), the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress" (*citation of cases*). "The inaction of Congress, however, in nowise affected its power over the subject" (*citation of cases*), "and now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is" (*citation of cases*).

In Missouri, Kansas & Texas R. Co. *vs.* Wulf, 226 U. S., 570, where the action was by a surviving

mother to recover for the wrongful death of her son which occurred while he was in the company's employ as a locomotive fireman, it is said (p. 575):

> "That since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the employers' liability act and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding State laws upon the subject."

In Michigan Central R. Co. *vs.* Vreeland, 227 U. S., 59, it is said (p. 65):

> "We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles * * * (p. 66). By this act (of April 22, 1908) Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States * * * (p. 68).
>
> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully in-

> jured, for the loss and damage resulting to them financially by reason of the wrongful death. * * * There is no express or implied limitation of the liability to cases in which the death was instantaneous.
>
> "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that alone."

In American R. Co. *vs.* Didrickson, 227 U. S., 145, which was an action under the Federal statute here in question by the surviving parents of the deceased employee, it is said (p. 147):

> "That the deceased left neither wife nor child is not denied. That the plaintiffs were therefore, as his surviving parents, the sole beneficiaries under the statute, is also conceded." * * *

(P. 149:)

> "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. *The damages recoverable are*

> *limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee.* (Italics ours.) The damage is limited strictly to the financial loss thus sustained." * * *

In Gulf, Colorado & Santa Fe Ry. Co. *vs.* McGinnis' Adm'x, 228 U. S., 173, where the action had been brought in the State (Texas) court, though under the Federal Employers' Liability Act, to recover damages for the wrongful death of an interstate employee, it appeared that decedent left a widow and four children, one of whom was a married woman, residing with and maintained by her husband, and there was no allegation or showing that she was possessed of any reasonable expectation of any pecuniary benefit as a result of the anticipated continuation of decedent's life. The suit was brought by the widow, as administratrix, for the benefit of herself and all four surviving children, including the married woman above referred to. Under the instructions of the court, which were excepted to, the jury found for the plaintiff and apportioned its judgment one-half to the widow and the remainder equally among the four children, including the married woman, and judgment was entered accordingly. This judgment was affirmed by the Court of Civil Appeals, but was reversed by this court, which said (p. 175):

> "In a series of cases lately decided by this court, the act in this respect has been con-

strued as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues, as are shown to have sustained some pecuniary loss (quoting from American R. Co. *vs.* Didrickson, *ubi supra,* as above set forth)."

Page 176:

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

In St. Louis, I. M. & S. Ry. Co. *vs.* Hesterly, Admr. (228 U. S., 702), in error to the Supreme Court of the State of Arkansas, which was an action for personal injuries resulting in the death of the plaintiff's intestate, where the declaration contained two counts, the first for the pecuniary loss to the next of kin, and the second for the injury and pain suffered by the intestate and the jury found verdicts in different amounts on each count and judgment went on both, the Supreme Court of the State sustained the judgment of the

trial court. At the trial the defendant had asked for a ruling that plaintiff could not recover under the second count, which was denied subject to exception and it was said by this court:

Page 703:

> "The Supreme Court (of Arkansas) treated the request as intended to raise the question whether the Employers' Liability Act of Congress of April 22, 1908, c. 149, 35 Stat., 65, displaced the State law, *as undoubtedly it was;* and stated that the suit was not based upon that act and held that the act of Congress was only supplementary and that the judgment could be upheld under the State law." * * *

Page 704:

> "Coming to the merits it now is decided that the act of Congress supersedes State laws in the matter with which it deals. (Citing cases.) The act deals with the liability of carriers, while engaged in commerce between the States, for defects in cars. §1. In the case of death the only act is for the benefit of the next of kin. §1. (Citing cases.) Therefore the ruling of the State court was wrong. The amendment of April 5, 1910, c. 143, §2, 36 Stat., 291, in like manner allows but one recovery, although it provides for survival of the right of the injured person."

In St. Louis, S. F. & Texas Ry. Co. *vs.* Seale (229 U. S., 156), in error to the Court of Civil

Appeals for the Fifth Supreme Judicial District of the State of Texas, where the action was against the company "by the widow *and* parents of one of its employees," to recover for the employee's death while in its service as the result of negligence of other employees, it was contended in the trial court by the company that under the circumstances its liability, if any, "was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908," and that if liable it was only so to personal representatives of the deceased and not to the plaintiffs or any of them. This contention was denied by both State courts and its correctness was the subject of decision here. In disposing of this question this court said:

Page 158:

> "There was a Texas statute on the subject and also the Federal one. Both could not occupy the same field, and they were unlike. The Texas statute gave the right of action to the 'surviving husband, wife, children and parents' and provided that it may be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal repesentative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee.' There were other points of dissimilarity, but they need not be noticed. If the Federal statute was applicable, the State statute was excluded by reason of the

supremacy of the former under the national constitution. (Citing cases.) And if the Federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action. (Citing cases.) The real question, therefore, is, whether the Federal statute was applicable, and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged and while he was employed by it, in interstate commerce." (Citing cases.)

"The plaintiffs' petition was altogether silent upon that subject, and the defendant, by appropriate special exceptions, called attention to the two statutes, insisted that whether one or the other applied depended upon facts not stated, and asked that the plaintiffs be required so to state the facts as to enable it to perceive which statute was relied upon. The exceptions were overruled, and when that matter came before the Court of Civil Appeals it said, 'the action was brought under the State law, and the petition stated a good cause of action and was not subject to the exceptions presented'. By its answer the defendant put in issue the allegations of the petition, and the evidence adduced upon the trial established without dispute" (p. 161), "that the case made by it was within the Federal statute." * * *

"It comes then to this: The plaintiffs' petition, as ruled by the State court, stated a case under the State statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the State statute might not be the applicable one.

But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the State statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it. *Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited.*" (Italics ours.)

"The judgment of the State court was reversed and the cause remanded 'without prejudice to such rights as a personal representative of the deceased may have."

The Net Proceeds of This Judgment Are Not "Assets of the Decedent's Estate" Within the Ordinary Acceptance of That Phrase.

The suggestion of the New York Court of Appeals, to the effect that the Federal power to regulate commerce in so far as it relates to employees of common carriers engaged in interstate commerce, "must end with the death of the employee," and that "in so far as it attempts to distribute the funds (damages recovered under the Federal law by a personal representation) is invalid and unauthorized," is illogical and contrary to established law in similar conditions.

The right of action given by the Federal Employers' Liability Acts is wholly dependent upon the disposition of the Congress in such regard. It does not inhere in the common law and may be extended or withheld in the nature of a gratuity, as the Congress may see fit. If capable of being extended or withheld *in toto*, it may be extended upon conditions, and in favor of those only whom the Congress may select in the order and to the extent which the Congress may specify. This proposition is not novel and has the support of excellent authority.

In Marvin *vs.* Maysville St. R. R. & Transfer Co., 49 Fed., 436, where the right given by the Kentucky statute was to "the personal representative" to "institute suit and recover damages in the same

manner that the person himself might have done for any injury where death did not ensue," it is said:

> "The right given under this section never belonged to the decedent. It was never his property, if property it be, until recovery; but both the right and the remedy are given by the express language of the section to his personal representative, whoever that might be, after his death.
>
> "It is quite true that this recovery, if obtained, is a part of the personal estate of the decedent, and as such is subject, *in this State*, to the payment of his debts, and goes to his distributees under the statute of the State as other personal property. This is, however, by force of the statute, and not because it ever belonged to the decedent. It is compensation for his death when recovered, which becomes a part of his personal estate by force of the statute, and could as well have been given to his wife, if one survived him, or any kinsman or connection of the decedent, if the statute had so provided. We think, therefore, that the right to recover for the death of a decedent given by this section is not assets upon which an administration of a non-resident decedent could be obtained in this State."

In McCarty *vs.* New York, L. E. & W. R. Co., 62 Fed., 437, a suit under the New Jersey death statute, which gave a right of action "to the personal representative for the benefit of the widow and next of kin," it is said:

> "The amount recovered, if any, will belong to the widow and next of kin, and can never be any part of the assets of the estate. The administration of estates is strictly local, but this suit is not any part of such administration. The plaintiff, by becoming administratrix, became the person to whom the right of action was given. The administration merely designated the person; the statute gives the right of recovery."

In Wilson *vs.* Tootle, 55 Fed., 211, where the death statute of Minnesota which gave a cause of action to "the personal representative of the deceased" and provided that "the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person," it was said:

> "The money recoverable in this action is in no sense of the term an asset. It never was of the property of the intestate. It arose only upon his death. By the express provisions of the statute it is exempt from the debts of the intestate or the usual incidents of administration. *No question, therefore, can arise as to its devolution under the succession laws of this State* (the State of the forum), or of its liability to the claims of local or other creditors. On the contrary by the very terms of the statute of Minnesota the fund which would arise from the action would be a trust fund, held by the administrator for the sole benefit of the widow and next of kin. To all intents and purposes, therefore, the administrator is made by the statute the trustee of an express trust."

In Stewart *vs.* Baltimore & Ohio R. R. Co. (168 U. S., 445), in error to the Court of Appeals of the District of Columbia; where the action was brought in the courts of the District to recover under the statute of Maryland for the wrongful death of plaintiff's intestate, which occurred in that State, this court, discussing the differences and likeness between the statutes of the District of Columbia and that of the State of Maryland on the subject of action and recovery for wrongful death, said:

Page 449:

> "What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any

thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

"For the purpose of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party." * * *

Page 450:

"It is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party.

"Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely

to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

"We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland."

In Florida Cent. & P. R. Co. *vs.* Sullivan (120 Fed., 799) it was said:

"As to the objection grounded on the different disposition of the fund by the laws of Florida and the laws of Alabama, it is enough to say that the law of Florida which gives the right, and gives direction to the proceeds of such a recovery, is the law of the case both as to the recovery and to the disposition of the proceeds. It would be a reproach to the laws of Alabama to say that, when the money recovered in such an action as this came into the hands of the administratrix, the courts of that State could not compel its distribution as the law of Florida applicable thereto directs."

The processes of reasoning applied by the learned courts of New York and the conclusion to which they led, were both contrary to the principles declared by these cases and in our view so evidently erroneous as to necessitate a reversal of the judgment founded thereon, here complained of.

The decisions cited and quoted from make it sufficiently clear that it was the undoubted intention of Congress in enacting the Employers' Liability Act of 1908 to override all State laws on the subject, not only as to the right of action granted, but also as to the application of the fruits of the exercise of that right.

With reference to the statement made in the course of the opinion of the State Supreme Court, Appellate Division, to the effect that such an assumption of power on the part of the Federal Government constituted "an advance into governmental territory heretofore free from invasion" (R., 23), the opinions of this court in United States *vs.* Hall, 98 U. S., 343, and McCune *vs.* Essig, 199 U. S., 387, are apposite and will prove interesting. But if, as we conceive, the power exists on the part of the Federal Government to advance into such territory, neither the policy of such advancement nor the manner selected for its exercise would seem to be open for extended discussion here.

It being conceded that the Federal Government, when operating within its own proper sphere, is supreme, it is of the very essence of that supremacy that it should also possess the incidental power to remove all obstacles to its operation and to that end "so to modify every power vested in subordinate governments as to exempt its own operations from their influence" (McCulloch *vs.* Maryland, 4 Wheaton, 316).

In the present instance Congress has deemed it a wise regulation of the commerce among the several States to grant to a personal representative of a deceased in certain circumstances a definite right of action on behalf of definite beneficiaries. Any deviation from the course thus mapped out contravenes the purpose of Congress and to that extent at least constitutes "an obstacle to its action."

It is respectfully submitted that the judgment of the Supreme Court of New York under review should be reversed and the case remanded to that court with instructions to reinstate and affirm the judgment of the special term in favor of the administratrix and widow, Susan J. Taylor.

FREDERIC D. MCKENNEY.
JOHN SPALDING FLANNERY.
WILLIAM HITZ..